117 388

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~308~~ 65

JACOB JOHNSON AND JAMES B. CARTER, OWNERS OF THE TUG BOAT "PARKER," AND HENRY A. CHRISTY, PLAINTIFFS IN ERROR,

vs.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED SEPTEMBER 28, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 308.

JACOB JOHNSON AND JAMES B. CARTER, OWNERS OF THE TUG BOAT "PARKER," AND HENRY A. CHRISTY, PLAINTIFFS IN ERROR,

vs.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from circuit court of Cook county	1	1
Caption	1	1
Petition	1	1
Attachment bond	7	4
Attachment writ	9	5
Bond	11	6
Writ of restitution	14	6
Demurrer and exceptions	15	7
Motion for default	17	8
Motion for leave to file affidavit of merits	17	8
Order overruling motion for leave to file affidavit of merits, &c.	18	8
Order denying motion to set aside default, &c.	19	9
Order denying motion of Carter for appeal	20	9
Bill of exceptions of James B. Carter	20	10
Motion for appeal	21	10
Bill of exceptions of James B. Carter	22	11
Motion of Carter to be made party defendant	23	11
Affidavit of James B. Carter	24	11
Bill of exceptions of Jacob Johnson	26	12
Motion to file affidavit of merit	27	13
Affidavits of Jacob Johnson	28	13
Henry W. Magee	32	15
Motion to dismiss petition	35	17

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Order overruling motion for leave to file answer, &c.	37	17
Hearing	38	18
Verdict	38	18
Judgment	39	18
Order extending time to file appeal bond and bill of exceptions	41	19
Bill of exceptions	41	19
Motion to file answer, &c	42	19
Answer	42	20
Affidavit of merits	46	20
Testimony of John Metchurf	48	22
J. J. Cook	55	26
Wm. H. Harper	64	31
Instructions given on behalf of plaintiff	68	33
Instructions asked by defendants	69	33
Motion for new trial	70	34
Affidavits of Jacob Johnson	72	35
of H. W. Magee	77	37
Order extending time to file appeal bond	81	39
Order allowing affidavits to be filed *nunc pro tunc*	81	39
Appeal bond	82	39
Clerk's certificate	84	40
Assignment of errors	84	40
Clerk of appellate court certificate	86	41
Transcript from appellate court	87	41
Caption	88	41
Motion to dismiss	89	41
Affidavit of Wm. H. Harper	91	41
Objections to motion to dismiss	93	43
Affidavit of Jacob Johnson	95	44
Submission of motion to dismiss	95	45
Additional objections to motion to dismiss	97	45
Motion to dismiss (renewed)	98	46
Motion to dismiss reserved	99	46
Cause taken under advisement	100	47
Judgment	100	47
Motion for appeal submitted	101	47
Petition for appeal	102	47
Order allowing appeal	103	48
Appeal bond	104	48
Clerk's certificate	106	49
Assignment of errors	107	49
Submission	109	50
Opinion	110	51
Judgment	116	54
Order denying rehearing	117	54
Clerk's certificate	118	55
Petition for writ of error	119	55
Bond	121	56
Citation	123	57
Service of citation	124	57
Writ of error	126	57
Return to writ of error	129	58
Assignment of errors	130	59

a STATE OF ILLINOIS:

Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa on Tuesday, the fifth day of September, in the year of our Lord one thousand eight hundred and eighty-two, within and for the northern grand division of the State of Illinois.

Present: John M. Scott, chief justice; Pinkney H. Walker, justice; John Scholfield, justice; T. Lyle Dickey, justice; John H. Mulkey, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice; James McCartney, attorney general; Thomas Clark, sheriff; Everell F. Dutton, clerk.

Appeal from Appellate Court, First District.

JACOB JOHNSON, JAMES B. CARTER, and HENRY A. CHRISTY
vs.
THE CHICAGO AND PACIFIC ELEVATOR COMPANY. } No. 666.

Be it remembered that heretofore, to wit, on the 2d day of September, A. D. 1882, there was filed in the office of the clerk of said supreme court a certain transcript of the record and proceedings of the circuit court of Cook county, with the assignment
b of errors thereon, which said transcript and errors assigned thereon are in the words and figures following, to wit:

1 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable T. A. Moran, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 16th day of January), in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred & sixth.

Present: Honorable T. A. Moran, one of the judges of the circuit court of Cook county, State of Illinois; L. L. Mills, States attorney; O. L. Mann, sheriff.

Attest: JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 22d day of September, A. D. 1881, The Chicago and Pacific Elevator Company, by Messrs. Rae and Smith, its attorneys, filed in said court its certain petition for attachment and attachment bond, and caused to be issued out of said court under the seal thereof the people's writ of attachment directed to the sheriff of Cook county to execute; which said petition, bond, and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County. To the October Term, A. D. 1881.

2 To the honorable the judges of the circuit court of the county of Cook, in the State of Illinois:

Your petitioner, The Chicago and Pacific Elevator Company, of Cook county, complains of Jacob Johnson, a resident of Chicago, in said Cook county, sole owner of the tug-boat Parker, and makes him defendant herein.

Your petitioner shows that it is a corporation organized and doing business in the State of Illinois under and by virtue of the laws of said State.

That your petitioner is and was at the time of the accident and damages hereinafter mentioned the proprietor and manager of a public warehouse of class A, said warehouse being situated in said Cook county and fronting on the North branch of the Chicago river at Goose Island, and being about 5½ feet from the east bank or shore of said branch, and was at said time engaged in transacting business in said warehouse, having before said time regularly procured from the circuit court of said Cook county a license to transact said business under the laws of said State, which said license was
3 duly and regularly issued according to the statute in such case made and provided, and was in full force and effect at the said time of said accident and damages hereinafter stated.

That said warehouse at said time was tight, firm, strong, and in good order and condition, and in every way well suited and adapted for the purpose for which it was used, viz., to store grain in, and contained at said time, amongst other things, some six hundred bushels of shelled corn, which said corn was in a bin in or near the corner of said warehouse, said bin being also at said time tight, staunch, firm, and strong, and in every way well adapted to hold and contain the same.

Your petitioner would further show that on or about the 29th day of August, and at the time of the accident and damages hereinafter complained of, said Jacob Johnson was the owner of the said tug-boat Parker and still is; that said tug-boat Parker was at said time, and still is, a water craft and tug-boat of above five tons burthen, used and intended to be used in navigating the waters of this State and the canals of this State, and having its home port in this State,
4 and is now in the port of Chicago, in said Cook county.

Your petitioner would further show upon information and belief that on or about the 29th day of August, 1881, the said tug-boat Parker, in the line of her employment, had a certain schooner, to wit, the G. C. Trampff, attached to said tug-boat, and made fast by a hauser or tug-line, in charge and under the officers of said tug-boat's management and control, and was engaged in towing the same on the said North branch of the said Chicago river, in said Cook county.

That at said time and place said tug-boat and schooner were so carelessly and negligently managed by the officers and crew of said tug-boat, and said schooner was so carelessly and negligently towed by said tug-boat and its master thereon and those having said tug-boat in charge and under their management and control, and being the agents and employees of said owner of said tug-boat, that said schooner was allowed to, and did at said time and place, come in contact with said warehouse and bin, and said schooner was, on account of said carelessness and negligence, allowed to and did run head on into said warehouse and bin, by reason whereof, and
5 for no other cause, and not on account of any negligence, fault, or misconduct of your petitioner or any defect in said warehouse or bin, the said schooner's jibboon *broak*, penetrated, and went through the walls of said warehouse and bin and caused a large quantity of said corn therein contained, to wit, six hundred bushels, to and it did spill and run out of said bin and warehouse into said North branch of said river, and thereby became and was lost, greatly to the damage of your petitioner.

That in order to ascertain the exact amount of said corn lost as aforesaid it became and was necessary for your petitioner to and he did go to a great expense, to wit, $3.99; that the damage done to said warehouse and bin on account of said accident as aforesaid was $20.

That your petitioner has been greatly damaged on account of the loss of the use of said bin while said repairs were being made; that by reason of said accident and damages as herein set forth and charged your petitioner has been and is greatly damaged, and has suffered loss to the extent of at least $394.38, together with interest thereon from August 29th, 1881, which amount is still due and on
6 unpaid your petitioner, after allowing all payments and just offsets, which has been demanded of said defendants, but he refuses to pay the same or any part thereof.

Your petitioner, therefore, prays that a writ of attachment may issue against said defendant directed to the sheriff of Cook county, commanding him to attach said tug-boat and water craft and to summon said defendant to appear at the October term of said court, according to the statute in such cases made and provided.

Aand upon the final hearing of this cause the court may be pleased to decree and subject said tug-boat to a lien thereon, together with her tackle, apparel, and furniture, for the damages aforesaid, together with interest and costs, and that your petitioner may have such other and further relief as he is entitled to in the premises.

And your petitioner will ever pray, etc.

[Corporation Seal.]

CHICAGO & PACIFIC ELEVATOR CO.
RAE AND SMITH, *Sol's for Pet.*

STATE OF ILLINOIS, }
County of Cook, } *ss:*

7 Wm. H. Harper, on oath, doth depose and say that he is the agent of the Chicago and Pacific Elevator Company (pe-

titioner), and as such authorized to make this affidavit; that he has heard read the above and foregoing petition and knows the contents thereof, and that the same is true of his own knowledge and belief, except as to matters and things therein stated on information and belief, and as to them he verily believes it to be true.

WM. H. HARPER.

Subscribed and sworn to before me this 15th day of September, A. D. 1881.

[NOTARIAL SEAL.] EDWIN B. FRANKS,
Notary Public.

Attachment Bond.

Know all men by these presents that we, The Chicago and Pacific Elevator Company and Wm. H. Harper, are held and firmly bound unto Jacob Johnson in the penal sum of eight hundred dollars and —— cents, lawful money of the United States; for the payment of which said sum, well and truly to be made, we bind ourselves,
8 our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of September, 1881.

The condition of the above obligation is such that whereas the above-bounden The Chicago and Pacific Elevator Company has on the day of the date hereof prayed an attachment out of the circuit court of Cook county, at the suit of The Chicago and Pacific Elevator Company against the tug-boat Parker, property of the above-named Jacob Johnson, the said Jacob Johnson being the defendant in the said cause for the sum of three hundred ninety-four and $\frac{38}{100}$ ($394.38) dollars; and the same being about to be sued out of said court, returnable on the third Monday of October, A. D. 1881, to the term of the said court then to be holden: Now, if the said The Chicago and Pacific Elevator Company shall prosecute its said suit with effect, or in case of failure therein shall well and truly pay and satisfy the said Jacob Johnson all such costs in said suit and such damages as shall be awarded against the said The Chicago and Pacific Elevator Company, its assigns or legal representatives, in
9 any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

[Corporation Seal.]

CHICAGO AND PACIFIC ELEVATOR CO.,
By ABNER TAYLOR, *President.* [SEAL.]
WM. H. HARPER, *Sec'y.* [SEAL.]
ABNER TAYLOR. [SEAL.]
WM. H. HARPER. [SEAL.]

Signed, sealed, and delivered in presence of—
A. R. KELLOGG.

Att'ch't Writ

STATE OF ILLINOIS, } ss:
County of Cook, }

The people of the State of Illinois to the sheriff of Cook county, Greeting:

Whereas The Chicago and Pacific Elevator Company, of Cook county, hath complained that Jacob Johnson, sole owner of the tug-boat Parker, is justly indebted to it, the said The Chicago and Pacific Elevator Company, in the sum of at least three hundred and ninety-four dollars and thirty-eight cents, together with interest thereon from August 29th, 1881, for which he claims a lien upon said vessel, and has given bond with security, as required by law:

We thereupon command you that you attach the said tug-boat Parker, her tackle, apparel, and furniture, to satisfy such demand and costs and all such demands as shall be exhibited against said vessel according to law; and, having attached the same, you summon the said Jacob Johnson, sole owner as aforesaid, to be and appear before the circuit court of Cook county, at its next term, to be — at the court-house in the city of Chicago, in said county, on third Monday (being the 17th day) of October, A. D. 1881, then and there to answer what may be objected against him and the said tug-boat "Parker."

And have you then and there this writ, with a return thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said circuit court of Cook county, Illinois, and the seal thereof, at Chicago, in said county, this 22d September, A. D. 1881.

[SEAL.] JACOB GROSS, *Clerk.*

Endorsed:

By virtue of the within writ I did levy upon and attach all the right, title, and interest of the within-named Jacob Johnson in and to the tug-boat Parker, together with her tackle, apparel, and furniture; also served the within writ on the within-named Jacob Johnson by reading the same to him this 22nd day of September, 1881.

O. L. MANN, *Sheriff,*
By T. E. STACY, *Deputy.*

The above property was released as per order hereto annexed.

O. L. MANN, *Sheriff,*
By T. E. STACY, *Dep't.*

And thereupon on the same *same* day, to wit, the 22nd day of September, A. D. 1881, there was filed in said cause a certain bond to release vessel, and there issued out of said court, under the seal thereof, a certain writ of restitution directed to the sheriff of Cook county to execute; which said bond and writ are in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Jacob Johnson, owner of the tug-boat Parker, as principal, and Henry A. Christy, as
12 surety, are held and firmly bound unto The Chicago and Pacific Elevator Company in the penal sum of eight hundred dollars, lawful money of the United States of America, to be paid unto the said The Chicago Pacific Elevator Company, or its legal representatives; for the payment of which said sum, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 22nd day of September, A. D. 1881.

The condition of the above obligation is such that whereas a petition was filed in the circuit court of Cook county on the 22nd day of September, A. D. 1881, by the said The Chicago and Pacific Elevator Company against the said the tug-boat "Parker," her tackle, apparel, and furniture, in a certain action, etc., for damages therein alleged to be due and owing to the said The Chicago and Pacific Elevator Company from the said Jacob Johnson, owner of the said tug-boat Parker, amounting to three hundred and ninety-four dollars and thirty-eight cents, together with interest thereon from August 29th, 1881:

Now, therefore, if the above-bounden Jacob Johnson, owner
13 of the said tug-boat Parker, and who desires the return of said tug-boat "Parker," now in the hands of the sheriff of said Cook county, attached by virtue of said petition and a writ issued in accordance therewith, shall and will pay all money adjudged to be due said The Chicago and Pacific Elevator Company by the said circuit court of Cook county, with costs of suit, then the above obligation to be void; otherwise to remain in full force and effect.

JACOB JOHNSON. [SEAL.]
HENRY A. CHRISTY. [SEAL.]

Taken and approved by me this 22nd day of September, A. D. 1881.

JACOB GROSS, *Clerk.*

14 *Writ of Restitution.*

STATE OF ILLINOIS, } ss:
County of Cook, }

The people of the State of Illinois to the sheriff of said county Greeting:

Whereas you were lately commanded by our circuit court of Cook county to attach the tug-boat "Parker," her tackle, apparel, and furniture, to satisfy the Chicago and Pacific Elevator Company of a certain claim of the alleged amount of three hundred and ninety-four & $\frac{38}{100}$ dollars, and interest thereon from August 29th, 1881; and

whereas Jacob Johnson, the owner of said tug-boat "Parker," has this day filed in said court his certain bond, in accordance with sec. 15 of chapter 12 of the Revised Statutes of Illinois:

Now, therefore, we command you that you return the said property so by you attached to the Jacob Johnson, owner, &c., according to law and the statutes in such case made and provided.

Witness Jacob Gross, clerk of our said court, and the seal thereof, at Chicago, in said county, this 22nd day of September, 1881.

[SEAL.] JACOB GROSS, *Cleark.*

15 And thereupon, on the 17th day of October, A. D. 1881, there was filed in said cause a certain demurrer and exceptions in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. September Term, A. D. 1881.

THE CHICAGO AND PACIFIC ELEVATOR CO. }
vs. } Gen. No. 39168.
THE TUG-BOAT PARKER. }

Jacob Johnson, who has been summoned in the above entitled cause by Magee and Adkinson, his attorneys intervening for his interest in the tug-boat attached in this cause, her tackle, apparel, and furniture, comes and defends, &c., when, &c., and excepts to the said petition, and says that the said petition and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the petitioner, the Chicago and Pacific Elevator Company, to maintain its aforesaid action, and that neither this claimant nor the other owners thereof are bound by law to answer the same, and this he is ready to verify.

16 Wherefore, for want of a sufficient petition in this behalf, this claimant, Jacob Johnson, prays judgment, and that the petitioner may be barred from maintaining its aforesaid action, and this complainant & defendant, for causes of demurrer and exception thereto, shows to the court the following exceptions to the said petition, viz:

It does not appear therein that the said tug-boat had sole control of the said schooner, the G. C. Trumpff.

That it appears that the carelessness and negligence alleged was by the officers and crew of both the tug-boat and schooner.

That in and by said petition it appears that the alleged damage was caused by the said schooner.

That the said court is without jurisdiction to create or enforce a lien upon said steam tug-boat.

That the amount due is not set forth in said petition.

That said petition is not signed by an officer of the said company, and the said petition is in other respects uncertain, informal, and insufficient.

MAGEE AND ADKINSON,
Attorneys and Proctors for Claimant and Defendant, Jacob Johnson.

17 And thereupon, on the 21st, 22nd, & 31st days of October, and the 5th day of November, A. D. 1881, the following, among other proceedings, were had and entered of record in said court, to wit:

Attachment.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat "Parker," and TUG-BOAT PARKER. } 39168. 7527.

OCT. 21, '81.

This day came the said plaintiff, by its attorney, and entered its motion that the default of said defendant be taken for want of an affidavit of merits on file therein on the part of said defendant.

Attachment.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of the Tug-boat "Parker," and TUG-BOAT PARKER. } 39168. 7527.

OCT. 22d, '81.

This day came the said defendant, —— ——, by his attorney, and enters his cross-motion for leave to file an affidavit of merits in said cause.

18 *Attachment.*

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat Parker, and TUG-BOAT PARKER. } 39168. 7527.

OCT. 31, '81.

This day came on to be heard the cross-motion of said defendant for leave to file an affidavit of merits in said cause and was argued by counsel, and the court, being fully advised in the premises, doth overrule said motion, to which ruling of the court the said defendant, by his attorney, now here excepts; and thereupon it is ordered that, for want of an affidavit of merits, the default of said defendant, Jacob Johnson, be, and the same is hereby, taken and entered herein of record; wherefore it is considered that said plaintiff ought to recover of said defendant its damages by reason of the premises. Whereupon the said defendant, by his attorney, enters his motion to vacate said default, which motion is now here continued by the court for hearing until 10 o'clock in the forenoon of the 5th day of November proximo.

19 *Attachment.*

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat Parker, and TUG-BOAT PARKER. } 39168. 7527.

Nov. 5, '81.

This day came on to be heard the motion of said defendant, Jacob Johnson, to vacate the default heretofore taken and entered herein against him and was argued by counsel, and the court, being fully advised in the premises, doth overrule said motion, to which ruling of the court the said defendant, by his attorney, now here excepts; and thereupon came James B. Carter, by his attorney, and moves the court that he be made a party defendant in said cause, and the court, after hearing arguments of counsel thereon, and being fully advised in the premises, denies said motion; to which ruling said Carter, by his said attorney, excepts; whereupon the said defendant, by his attorney, moves the court to dismiss said petition out of this court for want of jurisdiction. On consideration whereof the court overrules motion; to the overruling of which defendant's attorney excepts.

20 And thereupon, on the 26th day of November, A. D. 1881, the following order was made and entered of record, and there was filed in said cause a certain bill of exceptions of James B. Carter, which said order and bill are in the words and figures following, to wit:

Order.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JABOB JOHNSON, Owner of Tug-boat Parker, and TUG-BOAT PARKER. } 39168. 7527.

Attachment.

This day came James B. Carter, by his attorney, and excepts to the order heretofore entered herein overruling his motion to be made a party codefendant in said cause, and prays an appeal from said order to the appellate court of the first district of Illinois, and the court, after hearing arguments of counsel thereon, and being fully advised in the premises, denies said prayer, to which ruling of the court the said Carter, by his said attorney, now here excepts.

Bill of Exceptions of James B. Carter.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. October Term, A. D. 1881.

21 CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168,
vs. 7527.
THE TUG PARKER. }

Attachment of water craft.

Be it remembered that on the 26th November, A. D. 1881, came James B. Carter, by Magee and Adkinson, his attorneys, and moves the court:

Attachment of Water Craft.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook Co. October Term, A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. Term No. 7527.
THE TUG PARKER. }

And now comes James B. Carter, by Magee and Adkinson, his attorneys, and moves the court to grant an appeal to the said Carter from the order of this court of the 31st of Oct., A. D. 1881, denying to the said Carter leave to defend against the petition in said cause.

By MAGEE AND ADKINSON,
His Attorneys.

November 26th, 1881.

And thereupon the said appeal was denied.

And because the matters do not appear of record the said
22 James B. Carter presents this his bill of exceptions, and prays the same may be signed and sealed by the honorable judge of this court, pursuant to the statute in such case made and provided, which is accordingly done this 26th day of November, A. D. 1881.

T. A. MORAN, [SEAL.]
Judge.

And thereupon on the same day, to wit, the 26th day of November, there was filed in said cause *nunc pro tunc* as of November 19th, 1881, the certain bill of exceptions of James B. Carter and Jacob Johnson in the words and figures following, to wit:

Bill of Ex. of James B. Carter.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court. October Term, A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. } Term No. 7527.
JACOB JOHNSON.

Attachment of water craft.

Be it remembered that on this October 31st, A. D. 1881, came Jas. B. Carter, of said county and State, by Magee and Adkinson, his solicitors, and moves the court:

23 *Attachment of Water Craft.*

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court, Cook County. October Term, A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. }
JACOB JOHNSON.

And now comes James B. Carter, part owner of said tug Parker, by Magee and Adkinson, his attorneys, and *and* moves the court to be made party defendant and to be permitted to defend against the petition filed herein, and offers to furnish security for payment of costs, satisfactory to the court, according to the statute.

MAGEE AND ADKINSON,
Attorneys for James B. Carter.

Offering to furnish satisfactory security for payment of costs according to the statute, and read and filed in support of said motion the following affidavit:

24 *Attachment of Water Craft.*

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. October Term, A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. }
THE TUG PARKER.

James B. Carter, of said county and State, being first duly sworn, on his oath says that he was at the time of the levy of the attachment herein, and still is, a part owner of the steam tug Charles W. Parker, attached in this cause by the name of Parker, and moves the court that he be made defendant and have leave to defend against the

petition filed herein upon filing satisfactory security for costs, and affiant further says that he is interested in said suit, and has a good defense upon the merits to said suit.

(Signed) JAMES B. CARTER.

Subscribed and sworn to before me this 31st day of October, A. D. 1881.

[NOTARIAL SEAL.] HENRY W. MAGEE,
Notary Public.

25 STATE OF ILLINOIS, } ss:
Cook County, }

Henry W. Magee, of said county and State, being first duly sworn, says that the foregoing affidavit of James B. Carter is a substantial copy, as he verily believes, of an affidavit read and filed by him in open court in said cause on the 31st day of October, A. D. 1881, which is now lost from the files of said cause.

HENRY W. MAGEE.

Subscribed and sworn to before me this 11th day of March, A. D. 1882.

JACOB GROSS, *Clerk.*

And the court having heard said affidavit, which was all the evidence offor-d in that behalf, and having considered said motion, overruled the same; to which ruling of the court the said Carter then and there excepted, and because the matters aforesaid do not fully appear of record the said James B. Carter presents this his bill of exceptions, and prays that the same may be signed and sealed by the honorable judge of this court, pursuant to the statute, which is accordingly done November 19th, 1881.

T. A. MORAN, *Judge.* [SEAL.]

26 *Bill of Ex. of Johnson.*

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court. October Term, A. D. 1881.

Attachment of water craft.

CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. } Term No. 7527.
JACOB JOHNSON.

Be it remembered that on October —, A. D. 1881, came the said petitioner, by Rae and Smith, its solicitors, and moved the court that a default be entered herein against said defendant for want of an affid-vit of merits being filed with said defendant's demurrer and exceptions to said petition, which said motion was continued to October 22nd, 1881.

And now, on this October 22nd, 1881, comes said petitioner, by

its said solicitors, also comes said defendant, by Magee and Adkinson, his solicitors, and by cross-motion move the court to file the following affidavit of merits *nunc pro tunc* as of October 17th, 1881:

Attachment of Water Craft.

27 STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County, Term A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
THE TUG PARKER. } Gen. No. 39168.

Jacob Johnson, of said county and State, being first duly sworn, on oath says that he is a claimant in this cause of the tug attached, and that he has a good defence to and in the merits to said suit.

(Signed) JACOB JOHNSON.

Subscribed & sworn to before me this 22nd day of October, 1881.
JACOB GROSS, *Clerk.*

STATE OF ILLINOIS, } ss:
Cook County, }

Henry W. Magee, being first duly sworn, on his oath [says] that the foregoing affidavit is a substantial copy of an original affidavit read and filed in said cause, to the best of his knowledge, recollection, and belief.

HENRY W. MAGEE.

Subscribed & sworn to before me this 11th day of March, 1882.
JACOB GROSS, *Clerk.*

28 Which said motion and cross-motion are, by order of court, continued to October 31st, 1881.

And now on this October 31st, 1881, comes said petitioner, also comes said defendant, and offers in support of said cross-motion the following affidavit:

Attachment.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court, Cook County. October Term, A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON.

Jacob Johnson, of said county and State, being first duly sworn, on his oath says that he is the defendant or claimant in said cause; that the tug Parker is owned in part only by him, and that James B. Carter is part owner with him of said tug; that the damage com-

plained of by the complainant in this cause was done by the schooner The Trumpf; that affiant is informed and believes that the claim in this cause is grossly exag-rated, and was guessed at by the agents of the plaintiff.

29 That affiant is informed and believes that the court is without jurisdiction to hear and determins this cause.

That no proper and sufficient bond has been filed in this cause by the plaintiff or petitioner herein prior to the issuing of the writ of attachment in this cause; that the said bond filed herein was not conditioned as required by the statute in such cause made and provided.

That affiant is informed and believes that the said suit was instituted without due and proper authority from the plaintiff corporation herein; and further affiant saith not.

JACOB JOHNSON.

Subscribed and sworn to before me this 31st day of October, A. D. 1881.

[NOTARIAL SEAL.] HENRY W. MAGEE,
Notary Public.

STATE OF ILLINOIS, } ss:
Cook County, }

Henry W. Magee, of said county and State, being first duly sworn, on his oath says that the forgoing and annexed is a true copy of the affidavit read and filed in said cause on the 31st day of October, 1881.

HENRY W. MAGEE.

30 Subscribed and sworn to before me this 11th day of March, A. D. 1882.

JACOB GROSS, *Clerk.*

Which was all the evidence offered on said cross-motion, and the court, having considered the same, overruled said cross-motion and sustained said motion for said default and entered said default against said defendant; to all of which rulings of the court, and each of them, the defendant then and there excepted. And now again comes said defendant and moves the court to set aside said default; which said last motion is continued until November 5th, 1881.

And now, on this November 5th, 1881, comes the said petitioner, also comes said defendant, and offers in support of said last motion the following affidavits:

Attachment.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court, Cook County. October Term, A. D. 1881.

CHICAGO — PACIFIC ELEVATOR COMPANY *vs.* JACOB JOHNSON.

31 STATE OF ILLINOIS, } ss:
Cook County, }

Jacob Johnson, of said county and State, being first duly sworn, on his oath says that he is the defendant or claimant in said cause; that the tug Parker is owned only in part by him, and that James B. Carter is part owner with him of said tug; that the damage complained of by the complainant in this cause was done by the schooner The Trumpf; that affiant is informed and believes that the claim in this cause is grossly exag-erated, and was guessed at by the agents of the plaintiff; that affiant is informed and believes that the court is without jurisdiction to hear and determin- this cause; that no proper and sufficient bond has been filed in this cause by the plaintiff or petitioner herein prior to the issuing of the writ of attachment in this cause; that the said bond filed herein was not conditioned as required by the statute in such case made and provided; that affiant is informed and believes that the said suit was instituted without due and proper authority from the plaintiff corporation herein; and further affiant saith not.

JACOB JOHNSON.

32 Subscribed and sworn to before me this 31st day of October, A. D. 1881.

[NOTARIAL SEAL.] HENRY W. MAGEE,
Notary Public.

STATE OF ILLINOIS, } ss:
Cook County, }

Henry W. Magee, of said county and State, being first duly sworn on his oath says that the foregoing and annexed is a true copy of the affidavit read and filed in said cause on the 31st day of October, 1881.

HENRY W. MAGEE.

Subscribed and sworn to before me this 11th day of March, A. D. 1882.

JACOB GROSS, *Clerk.*

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. October Term, A. D, 1881.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
THE TUG PARKER.

Henry W. Magee, of said county and State, being first duly sworn, on

his oath says that he is the attorney of the defendant who has charge of this cause; that he was employed by the defendant or claim-
33 ant, Jacob Johnson, to defend the above-entitled cause in his behalf; that affiant, after being so retained by Jacob Johnson, examined the files in this action, and made particular examination of the bond and petition filed herein, and became satisfied that the petition was so indefinite and informal that the defendant or claimant Johnson would not be required to file an affidavit of merits with his demurrer herein, and consequently did not go to the office of the said defendant to have such an affidavit made, or procure it to be made.

That this affiant, relying upon his belief that the court would take no action upon the said petition and upon the said bond filed herein by the plaintiff when its attention was drawn to them, simply filed the demurrer and exceptions which has been filed herein. Affiant further says that the said demurrer and exceptions *was* not filed for delay, but because affiant believed that the grounds stated therein were well taken. Affiant further says that upon learning that a motion would be made in this cause for a default as against the defendant, Johnson, for want of an affidavit of merits, he at once procured such an affidavit from the said Johnson, and, before the said default had been taken, asked leave of court to file such affidavit of merits on behalf of
34 and by the said Johnson in this cause. Affiant further states that he believed that the court would not take default upon demurrer filed without an affidavit of merits unless the petition filed was itself drawn and sworn to in accordance with the statute in such case made and provided. And affiant says that the name "Parker" is not the name of the tug-boat attached in this cause, as appears from the enrollment which is herewith shown to the court, and affiant says that he has made examination of the names of the water craft, as appears in the list published by the Treasury Department of the United States, and finds, among others, the following: "Gracie M. Parker," "J. D. Parker," "Jason Parker," "Joseph Parker," "Leah Parker," "Mary Parker," "Sallie Parker," "Sam'l Parker," "Sophie Parker," "James Parker," "Eliza K. Parker," "Chas. W. Parker," "Asher S. Parker," "Alice Parker," "Addie Parker," "Geo. H. Parker," "Geo. O. Parker," and no craft named "Parker" appears therein, and that the said statute required that "the name of the water craft" should be stated in such petition, and that such petition should be verified by affidavit. Affiant further says *says* that the ownership of the tug attached and her true name appears in the public records of the United States Treasury Department at the city
35 of Chicago, in said county and State, and are accessable to the agent of the petitioner herein and could readily have been ascertained if the petioner and its agent had not, in their hot haste for an attachment and recklessness of statement, preferred to swear it through rather than examine the records for the truth thereof. And further affiant saith not.

HENRY W. MAGEE.

Subscribed & sworn to before me this fourth day of November, A. D. 1881.

[NOTARIAL SEAL.] J. FRANK RICHMOND,
Notary Public.

But the court having heard said affidavits, which were all the evidence offered, overruled said motion and refused to set aside said default; to which ruling of the court the defendant then and there excepted. And now again comes said defendant and moves the court as follows:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. October Term, A. D. 1881.

36 CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
THE TUG PARKER.

And now comes Jacob Johnson, part owner of the tug Charles W. Parker, which has been attached herein by the name of "Parker," by Magee & Adkinson, his attorneys, and moves the court to dismiss the petition filed herein for want of jurisdiction in said court to enforce the lien claimed and prayed for in said petition, and shows to the court that the said tug "Charles W. Parker," attached by the name of "Parker," is a steam vessel of above twenty tons burden, duly enrolled and licensed in *in* conformity to Title "L" of "Regulations of Vessels in Domestic Commerce" of the Revised Statute- of the United States, and was and now is engaged in the business of domestic commerce and navigation upon the navigable waters of the United States of America, and that exclusive jurisdiction to enforce a lien *in rem* on said vessel as prayed for is in the district courts of the United States of America.

By MAGEE & ADKINSON,
His Attorneys.

37 But the court having considered the same denied said motion, to which ruling of the court the defendant then and there excepted, and because the matters aforesaid do not fully appear of record the said defendant presents this his bill of exceptions, and prays that the same may be signed and sealed by the honorable judge of this court pursuant to the statute, which is accordingly done this November 19th, 1881.

T. A. MORAN, *Judge.* [SEAL.]

And thereupon, on the 30th day of January and the 11th day of February, A. D. 1882, the following, among other proceedings, were had and entered of record in said court, to wit:

Attachment.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat Parker, and TUG-BOAT PARKER. } 39168. 7527.

JANUARY 30*th*, '82.

This day came the said plaintiff and said defendant, by their respective attorneys, and the said defendant, by his attorney
38 now here, moves the court for leave to file answer and affidavit of merits in said cause, and the court, after hearing arguments of counsel thereon, and being fully advised in the premises, doth overrule said motion; to which ruling of the court the said defendant, by his attorney, now here excepts, and thereupon came the jurors of a jury of good and lawful men, to wit: Charles Wolbinz, C. N. Spitzer, J. Coombs, Edward Casey, J. H. Glesson, John Whitmore, James Taylor, Andrew Stark, Gates A. Riley, August Meyer, Henry Thies, Jr., and Seth J. C. Suther, who were duly impaneled and sworn to well and truly assess the plaintiff's damages, and a true assessment render according to the evidence, and who, after hearing the testimony adduced, retire from the bar of the court to concider of their verdict, and thereupon return into court and say: "We, the jury, assess the damages at $300."

Whereupon the said defendant, by his attorney, enters his motion to set aside said verdict and for a new trial of said cause.

39 *Attachment.*

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat Parker, and TUG-BOAT PARKER. } 39168. 7527.

FEB. 11TH, '82.

And now come the respective parties to this cause by the said attorneys, and said cause coming on to be heard upon the motion heretofore entered herein for a new trial, and the court having considered said motion, overruled the same, and the jury having heretofore assessed the damages of the plaintiff on occation of the premises against the said Jacob Johnson, defendant, by reason of his default for not having filed an affidavit of merits with his demurrer and exceptions herein, in accordance with the statute in such case made and provided, over and above its costs and charges by its suit in this behalf expended, at the sum of three hundred dollars, and it further appearing to the court that the said tug Parker, heretofore attached in said cause, has been released and discharged from custody, and a bond given, as provided by statute, in the penal sum of eight hundred dollars, and that said Jacob Johnson is
40 principal and one Henry A. Christy is surety in said bond; therefore it is concidered that the plaintiff do recover against said Jacob Johnson and Henry A. Christy its damages aforesaid, in

form aforesaid, and by reason of the statute in such case made and provided, assessed to the sum of three hundred dollars, together with its costs and charges to be taxed, and that the plaintiff have execution therefor.

To all of which the said Jacob Johnson and Henry A Christy, by their attorneys, now here except, and pray an appeal to the appellate court of the first district of Illinois, which is granted on condition that said Johnson and Christy do, within twenty days from date, execute and file an appeal bond in said cause, in the penal sum of four hundred and fifty dollars, with good and sufficient security thereto. And it is further ordered that said Johnson and Christy be, and they are, allowed twenty days from date in which to prepare and file a bill of exceptions in said cause.

And thereupon afterwards, to wit, on the 2d day of March, A. D. 1882, the following was made and entered of record in said cause:

41 *Attachment.*

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat Parker, *et al.* } 39168. 7527.

On motion of said defendants, by their attorney, it is ordered that the time in which to file appeal bond and bill of exception in said cause be, and it is, extended until the 11th instant.

And thereupon, on the 3rd day of March, A. D. 1882, there was filed in said cause a certain bill of exceptions in the words and figures following, to wit:

Attachment of Water Craft.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Circuit Court of Cook County. February Term, A. D. 1882.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of the Tug-boat Parker. } Gen. No. 39168.

Be it remembered that on the 30th day of January, A. D. 1882,
42 upon notice to the claimant, Jacob Johnson, upon the calling up of the above cause for the assessment of damages to the plaintiff, in default of said Johnson, the said Jacob Johnson, claimant of said tug Parker, attached herein, made and filed therein the following motion, with answer and affidavit, which was all the evidence in support of said motion.

Motion.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. November Term, A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. } Term No. 7527.
THE TUG PARKER.

And now comes Jacob Johnson, part owner and claimant of the tug Charles W. Parker, attached herein by the name of "Parker," and moves the court, by his attorneys, for leave to file the annexed answer and affidavit of merits to the petition of the complainant in the above-entitled cause.

By MAGEE AND ADKINSON,
Attorneys for Jacob Johnson, Claimant.

Answer.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. November Term, A. D. 1881.

CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. } Term No. 7527.
THE TUG "PARKER."

Attachment of water craft.

43 The answer of Jacob Johnson to the petition of The Chicago and Pacific Elevator Company against the Tug Parker shows to the court that he has been notified of this suit; that he is a claimant and part owner of the water craft attached in this cause. He denies that the said water craft is named the "Parker," and states that she is not named the "Parker." He denies that he is the sole owner of the water craft attached herein by the name of "Parker."

This claimant, further answering, says that he has no knowledge as to whether the petitioner is a duly organized corporation or is proprietor of the warehouse described. He admits that a warehouse described is located on the bank of the Chicago river, but as to its distance leaves petitioner to his proof and denies that it is a proper distance from the river. This claimant denies that the said warehouse is well suited, located, and situated as to vessels and adapted for its business as to them, but says the same was located on a public navigable stream and too near the bank thereof for safety. This complainant has no knowledge of the amount of shelled corn in said bin, and denies that said bin was tight,
44 strong, and adapted to its business and location.

This claimant admits that the tug-boat is a water craft above 20 tons burthen and engaged in navigating the waters of this and other States. This claimant admits that the said tug had the

schooner G. C. Trumpff in tow, but denies that the said schooner was under the sole management and control of said tug at the same time and place; denies that the said tug was carelessly managed by its officers and crew, but has no knowledge of his own *knowledge*, but alleges the same on information and belief; denies also that the said schooner came in collision with the said elevator by the sole act of the tug-boat or its misconduct. This claimant admits that the jib-boom of said schooner did penetrate the said warehouse, and *and* that some corn was spilled and lost, but this claimant has no knowledge of the amount or value thereof, but leaves the complainant to his proof, and has no knowledge of the expense attendant on measuring the same or the amount of damages to said bin or the amount of the loss and damage claimed by the petitioner. This claimant alleges, on information and belief, that the collision
45 refer-ed to in said petition was occa*t*ioned by want of care and skill of the persons managing the said schooner G. C. Trumpff, together with other natural causes; that the same occur-ed in the night time; that a strong current was setting through the river at that part occa*t*ioned by the opening of the Fulerton conduit and a change of wind, so that the current of the said stream, the Chicago river, was changed from a current down stream to a current up stream, which had not been sufficiently calculated upon by the officers and crew of the said schooner as they approached the said elevator; that the said elevator and warehouse upon the said river was built too close to the said stream; that the jib-boo*n* of the said schooner was only of the o.dinary length of schooners of said class; that the wall of the said bin was not of sufficient strength or thickness for a wall that was subject to being touched by the jib-boo*n*s of schooners in the navigation of the said stream; that the blow of the schooner was a very slight one to said wall; that the collision did not break the said jib-boo*n* or a single rope on board of said schooner.

That an outer wall of such an elevator alongside of such stream should be so strong as to break and carry away the jib-boo*n*
46 before allowing it to penetrate the wall, as this claimant is informed and believes; wherefore this claimant asks to have the above cause dismissed at the costs of the petitioner.

JACOB JOHNSON.

STATE OF ILLINOIS, }
Cook County, } *ss:*

Jacob Johnson, of said county and State, being first duly sworn, on his oath says that he has read and heard read the foregoing answer signed by him, and that the same is true except as to those matters stated on information and belief, and as to those matters he believes them to be true.

JACOB JOHNSON.

Subscribed and sworn to before me this 9th day of December, A. D. 1881.

JACOB GROSS, *Clerk.*

Resworn to before me this 12th day of Dec., 1881.

JACOB GROSS, *Clerk.*

Aff't of Merits.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. November Term, A. D. 1881.

47 CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No., 39168.
vs. } Term No. 7527.
THE TUG PARKER.

Attachment of water craft.

Jacob Johnson, of said county and State, being first duly sworn, on his oath says that he is one of the claimants of the tug attached in this cause, and is made a defendant therein, and that he verily believes that he has a good defense to the said suit upon the merits as to the whole of the plaintiff's or petitioner's demand. And further affiant saith not.

JACOB JOHNSON.

Subscribed and sworn to before me this 9th day of December, A. D. 1881.

JACOB GROSS, *Clerk.*

And which motion the court then and there denied; to which ruling and decision of the court the said Johnson then and there, by his counsel, excepted; and the court thereupon, against said Johnson's objection and exception, ordered the jury to be empaneled to assess the plaintiff's damages; and the plaintiff herein then proceeded to his damages; whereupon the plaintiff gave in evidence on its behalf as follows—that is to say:

48 JOHN METSHURF a witness sworn and examined on behalf of complainant, testified as follows:

Q. Give your name and residence.
A. John Metshurf; 63 George street.
Q. Where are you engaged working?
A. In the elevator.
Q. What elevator?
A. The Chicago and Pacific.
Q. How long have you been working there?
A. About four years.
Q. Do you remember the accident that occurred there on or about the 4th day of August, 1881?
A. Yes, sir.
Q. You may state as nearly as you can what occurred at that time; tell all you know about it.
A. I saw the next morning there was grain left in the river, and some lay on the dock, and a hole was in the bin.
Q. Did you see any vessels or schooner?
A. I seen a tug-boat coming down from the north side.
A. Did you know what tug-boat it was?
Q. If I ain't mistaken, the name was Parker.

Q. Did you see what made the hole or caused the hole to be made?

A. I seen the hole in the bin.

Q. Was there anything in the hole at the time you saw it?

49 A. There was quilts and stuff stuck in to stop the grain.

Q. How large a hole was it?

A. I couldn't say exactly; the hole was torn about two feet; something like that.

Q. Do you know the size of the bin in which the hole was made?

A. About 12 by 14 feet.

Q. Do you know what was in the bin just before the time the hole was made?

A. Yes, sir.

Q. State what.

A. Corn, 2.

Q. By that you mean No. 2?

A. I mean No. 2.

Q. Do you know how much corn there was in the bin?

A. I know the bin was full; I don't know how much in bushels; I never weighed it to know how much there was in it.

Q. Have you at any time weighed and measured that bin to know how much it would hold?

A. I don't know; they weighed the grain off.

Q. Did you assist in the weighing?

A. I did not.

Q. Do you know the size of the planks or boards of the elevator where the hole was made?

A. Yes.

50 Q. How large were they?

A. 2x8 upright and two sheeting board- on each side of it.

Q. What is the size of the sheeting boards?

A. Inch boards.

Q. How far distant was this elevator from the edge of the river at this point?

A. Kind of angleways; one end of it 5 ft. 11 and the other 5 ft. 2.

Q. 5 ft. 2, then, is the nearest point to the river?

A. Yes.

Q. How far from this point was the hole that was made in the side of the elevator?

A. Just about the same place.

Q. Then it was about 5 ft. 2, was it?

A. 5 ft. 2.

Q. How close together are these planks the elevator is made of?

A. The upright, you mean? They are 12 inches between; 14 from center.

Q. Are they more than one thickness; are there two thicknesses of planks?

A. There is two thicknesses of boards.

Q. Which way do the boards run; do they run the same way as the planks?

A. No, sir; the planks are upright, the first boards lengthways, and the sheeting boards slantways.

Q. How are these planks?

A. 2x8.

51 Q. The boards were together, were they, one over the other?

A. The sheetings, you mean? Yes.

Q. That means two in thickness, does it?

A. Yes.

Q. How are the bins built; nailed or riveted together, or how?

A. The boarding is nailed on and rods united them 2x8 outside for a belt.

Cross-examination by Mr. MAGEE:

Q. How large is this bin in which the hole was made?

A. 12x14.

Q. 12x14; what, feet?

A. Yes.

Q. Wide?

A. Yes.

Q. By 14 which way?

A. 14 the square way.

Q. How high was it?

A. 28 feet.

Q. Then it is 12x14x28?

A. Yes, sir.

Q. That is the size of the bin?

A. Yes; that is the size of the bin.

Q. How thick are the boards where the hole was made?

A. Where the hole was made?

Q. Where the hole was made; just how wide—111 thick scantling? Were the studdings — to the boards?

52 A. They was two by eight, and had a belt outside and inside of 2-inch boards.

Q. How many boards did the bowsprit of the schooner have to go through to get at the grain? Where did it strike?

A. The middle it struck, I should believe, and then broke some of the uprights 2x8, and then struck the inside boards.

Q. All it did was to go through the 2-inch boards in the elevator?

A. It had to go through the 2-inch boards outside and 2-inch scantlings, uprights, 2x8.

Q. It went between them?

A. No, sir; it broke the upright.

Q. Do you know whether it broke it in going in or coming out?

A. That is a question I cannot answer.

Q. You only know it was broken?

A. Yes.

Q. Was it pushed into the elevator, or was the upright pushed into the wall?

A. It was all broken into slivers; you could not see anything about it.

Q. How large was the hole?

A. Two feet.
Q. Square?
A. It wasn't no square hole; that would be rather funny if it was a square hole.
Q. Was it two feet around?
A. No, sir; it wasn't no round hole at all; it was a two-foot hole.
53 Q. Two feet in circumference or diameter, do you know—the bowsprit? Is not that about the thickness of the bowsprit—the diameter?
A. I know it was about two feet.
Q. The bowsprit?
A. No; the hole.
Q. But the bowsprit. I want to know if you know how thick it was—the diameter of the bowsprit—if you know.
Q. How big was the jib-boom?
A. It was about 6 inches, I think, the first of it.
Q. 6 inches on the end that went into the house.
A. Yes, sir.
Q. That went in between the studding and the two-foot boards?
A. No, sir; it broke.
Q. It broke first and then went between?
A. No, sir; it burst in.
Q. How did you know?
A. I could see the slivers sticking.
Q. Would not the slivers have been there if the bowsprit had broken through only the boards?
A. Yes, sir.
Q. When did you last see that?
A. On the evening of the 4th I went there.
Q. When was the grain put in there?
A. I couldn't tell.
Q. How long before?
A. Probably the same day; maybe before; I could not tell.
54 Q. Might not some have been put in that day, some the day before, and some the day before that?
A. Yes.
Q. When was the grain taken out of this bin?
A. The next day.
Q. But the last time before the accident?
A. I could not tell you.
Q. Did they take any out the week before, or were they continuing to put in the week before?
A. We—I don't know when that was taken out.
Q. Then you don't know how much was in the bin?
A. No, sir.
Q. Nor anybody else?
A. That is more then I could say.
Q. You would be as apt to know as anybody, would you not?
A. I could not tell.

Q. Did you have any talk with the captain of the vessel that day?
A. Not that I know of.
Q. Did you tell the captain of the tug-boat the bin only had a little grain?
A. I don't remember.
Q. How long have you been there?
A. About four years.
Q. Has that elevator been broken before by vessels?
A. Yes.
Q. It has?
A. Yes, sir.
55 Q. About how many times?
A. Once, and——
Q. That you know of—was any grain lost?
A. No, sir.
Q. Was there any grain in the bin at that time?
A. Well, they broke the spout.
Q. Was that elevator building as strong as this elevator had been?
A. That is more then I know; I have only seen the outside; don't know how it is built inside.
Q. There is no stone wall outside of this, is there?
A. No, sir.
Q. Mr. Smith, do you know how much grain was in the elevator last year, or at any time?
A. I don't know; I never kept track of that.

J. J. COOK, a witness sworn and examined on behalf of the complainant, testified as follows:

Q. Give your name and state your residence.
A. J. J. Cook, 376 North Market.
Q. What is your employment, Mr. Cook?
A. Superintendent of the Chicago and Pacific Elevator.
Q. How long have you been in their employ?
A. About four years.
56 Q. Do you remember the accident that occur-ed to the elevator there some time in August of last year?
A. Yes, sir.
Q. You may state what you know in regard to that accident.

Mr. MAGEE: I wish you would ask questions.

Q. Did you know of the elevator being broken, the bin burst, and the grain spilled out into the river?
A. Yes, sir.
Q. Do you know how much grain there was contained in the bin?
A. Yes.
Q. State how much there was.
A. Something over 25 hundred bushels.
Mr. MAGEE: I wish he would state accurately.

A. I have the exact figures here, if you will allow me to refer to——

Q. What is that paper?

A. A paper I made out at the time of our weighing the grain.

Q. That is your record in the books of your loss?

A. Yes, sir.

Objected to.

The COURT: That identical paper is the record you made at the time?

A. This is a copy of the identical paper.

Mr. MAGEE: The identical paper you copied into the books?

57 A. I kept no regular books, simply memoranda.

Q. But the elevator had to charge somebody with this loss, did you not? It must appear on the books.

A. I know nothing about that; I don't keep the books.

Q. Was not some report made?

A. Yes, sir.

Q. There is some record to show how much grain was lost?

A. I could not not say anything about that; the books are kept at the office. I only reported the amount of loss.

By Mr. SMITH:

Q. You made this memorandum at the time you made the other —when you weighed off the grain?

A. They was both made at the same time—you might say this was the original and the other the original too. One was made for my own convenience and the other for Mr. Harper.

Q. They were together, were they?

A. Yes, sir.

Q. State how many bushels of corn were lost by the accident—wait a moment; you are referring to your memoranda.

The COURT: He can use this. He made it at the time of the weighing, I understand.

Q. Do you remember the sum total independently of the paper you made at the time?

58 A. Having seen the papers I could not say; it was 612 bushels.

Q. Is that your remembrance?

A. Yes, sir.

Cross-examination by Mr. MAGEE:

Q. Did I understand you that if you had not had the paper you could not have remembered the amount?

A. I remember it was about that amount.

Direct — Mr. RAE:

Q. What time did you make this examination?

A. August 5; part of that was done on the 6th of August.

Q. Was any one with you when you made it?

A. I don't know.
Q. Did any one assist you in measuring?
A. No, sir; it was done by weighing.
Q. Did any one assist you in the weighing?
A. No, sir.
Q. State to the jury how you weighed it.
A. We weighed it with Fairbanks scales; we run up a draft and weighed it off; we weighed everything in the scales; everything fell into the scale.
Q. Did the scale give the amount set forth in that paper?
A. Yes.
Q. You put in everything and weighed the amount of each?
A. I have explained about the weighing—every grain that
59 was in the bin—and we found in the bin 99,380 lbs.
Q. Did you before or after the accident ascertain how much the bin would hold by filling the bin with grain or measuring?
A. Yes, after the accident; we knew just how much the bin would hold, and by weighing the grain in this manner we found how much grain was in the bin.
Q. You have put the bin in the same condition it was before the accident?
A. Yes, sir.
Q. Did you know its condition on the night previous to the accident?
A. Yes, sir.
Q. Do you know how much was in the night the accident occur-ed?
A. Yes.
Q. How much did you find was lost when you measured, after placing it in the same condition as before?
A. 612 bushels.
Q. Do you know what class of grain it was?
A. It was No. 2 corn.
Q. Do you know its market value?
A. I could not say positively; its value would be what it was worth that day in the market.
Q. Did you ever call on Mr. Johnson, owner of the tug, with reference to this loss?
A. I did with Mr. Harper.
Q. Did you show him the account?

Objected to.

60 Mr. RAE: Was the account made for the purpose of settlement, or to collect the amount due?
A. When we called on him I think Mr. H. presented the bill.
Mr. MAGEE: If you are in doubt about it don't state.
A. Well, I know he presented the bill.

Mr. MAGEE: Don't say "I think," then; say I know.

Q. Did you, together, collect the bill or compromise?

Objection.

The COURT: State what talk you had in the matter. Did he say anything about it?

A. We called on him in the afternoon and Mr. Harper presented the bill. Mr. Johnson looked it over; I think he refused to pay it.

Objected to. Objection overruled.

Q. How much did it cost to weigh the grain?

Objection.

[A.] ———.

Q. How much did it cost to repair the elevator?

Objected to.

[A.] ———.

The COURT: Answer if you know what were the repairs worth to put the bin in as good condition as it was prior to the accident.

Objection. Objection overruled and exception.

61 A. Say $25.00.

Q. Did you pay any less than that for repairs?

Objection. Objection overruled. Exception.

A. Well, I think not; I won't be positive about that; there was some material used in it; I don't know exactly what it cost.

Cross-examination by Mr. MAGEE:

Q. When did you see the bin last before the loss?

A. Some time during the afternoon of the 4th.

Q. How many bins are there in that elevator?

A. At that time 22.

Q. Do you know how much there was in the other bins that day?

A. No.

Q. You have no knowledge of how much was in the other bins; have you any knowledge of how much was in this bin that day, from your recollection?

A. No, sir.

Q. Had you put any grain into that bin during the 4th of August?

A. We might have put some in during the 4th; I would not be positive.

Q. Had you put any in on the 3rd?

A. I think we had—yes.

Q. There is a spout that goes to this bin that divides and runs into two bins, so that part of the grain runs into one bin and part into the other, is there not?

A. Yes, sir.

62 Q. Is not that the reason you are unable to tell how much was in the bin?

A. No, sir; the wall spout is made so that the grain could run into both, but it is also fixed so that it can run separately; there was a step down that let the grain run into the 2nd bin.

Q. Which bin do you mean?

A. I mean the bin it led into; I have not refer-ed to any other; I'm talking of the step to this bin.

Q. Was it not true that the spout that led into both bins had been used on the day before the one in question?

A. I could not say.

Q. Do you remember anything as to that?

A. I can't say I have known as to that.

Q. Is it not true this was used just prior to the accident?

A. It might have been.

Q. Is it not true that it was; is not that the reason you were unable to determine how much grain was in this principal bin, because it was divided between the two bins?

A. No, sir.

Q. What was the day when you looked into this bin; what day of the week?

A. I couldn't tell; it was the day before the accident.

Q. Do you know whether it was Saturday or Sunday?

A. Saturday.

Q. How many of the bins did you look into each day?

63 A. All of them.

Q. You looked into the bins from above down?

A. Yes, sir.

Q. When this grain was run out you think you have an idea how much grain was in there?

A. I know.

Q. How?

A. By looking into it.

Q. Your attention has been called particularly to that bin rather than to any other?

A. My attention was called to all of them.

Q. Could you tell the jury how high the grain stood in the other bins that day?

A. Yes; they were 20 feet.

Q. Could you have told within a foot how high it stood?

A. I could have told if it was full.

Q. Was this bin full?

A. Yes, sir; as full as it would run from the spout.

Q. How much was in it when it was full?

A. I gave you the figures here as near as I could—2,500 bushels.

Q. That was when you filled up the bins?

A. No, sir.

Q. After you filled up the hole you put in what was in before the accident?

A. Yes, sir.

Q. You say you weighed it, and weighed the balance you found?

64 A. Yes.

Q. And charged Mr. Johnson with the weight, amounting to 612 bushels?

A. Yes.

Q. Did you ever charge him with any other amount than that?
A. Never.
Q. Were you present when this amount was charged?
A. I was present when such a bill was presented.
Q. How much was it?
A. I could not say.
Q. You were there for the purpose of settlement, and can't say anything about it?
A. I was there, but Mr. Harper presented it.
Q. Do you know how much money it called for?
A. No, sir.
Q. Is it not a fact that you and Mr. Harper presented a bill for $1,200?
A. There was a bill made out somewhere in that neighborhood.
Q. Was that after you made your weight?
A. No, sir.
Q. Then you presented a bill for $1,200 without knowing anything about it?
A. I did not present the bill.

Objected to.

WILLIAM H. HARPER, a witness called and sworn in behalf of complainant, testified as follows:

Q. You reside in Chicago?
A. Yes, sir.
65 Q. In whose employ?
A. Chicago and Pacific Elevator.
Q. What is your employment?
A. Manager of the elevator.
Q. Were you present at the measurement of this corn?
A. No, sir.
Q. Do you know what the market value of corn was on the day of this loss?
A. The average price that day was 61.
Q. Are you on the Board of Trade?
A. Yes.
Q. That was the average of that day, was it?
A. Yes, as taken from the circular reports. Of course, without refreshing my memory, I cannot carry prices from time to time in my mind.

Cross-examination by Mr. MAGEE:

Q. Did you present a bill to Mr. Johnson?
A. Yes, sir.
Q. For how many bushels?
A. Something like 1,500.
Q. Indeed! Did Mr. Johnson pay you for it?
A. No, sir. I would like to explain about that bill. As soon as I heard of the accident I went to the docks to ascertain for myself where the schooner Trump was lying and see the captain of the vessel.

He was going out that evening. He said there had been damage, so he wanted me to make out a bill. The vessel was going
66 to be unloaded that afternoon and the captain of the vessel was very anxious I should make out my bill and present it. He told me where his office was. He said he would be glad to be told exactly what the damage was; how many bushels; how much to charge. He said at the same time to make out a bill and give it in. I went to his office and told him it was impossible to get at it exactly, but if he purposed to settle it he could go to the elevator with me and find the exact amount. We wanted nothing but the exact loss. There was some 2 or 3 hundred bushels saved we gave credit for. As a matter of fact we did not know there was grain under the elevator for two or three weeks—until the men got at work making the repairs.

Q. You think it was two or three weeks subsequently to the accident you ascertained there was 300 or 400 bushels under the elevator?

A. I should think some two or three weeks. We weighed off in the meantime and charged what we afterwards found to Mr. Johnson; it was discovered when the men gave in their items; in breaking through the building quite a large amount of grain we supposed had gone into the river was saved under the elevator, which we afterwards deducted from the amount of the bill.

67 Q. You made out the bill for enough, did not you?

A. We did not make it out for any too much.

Q. Do you know whether there is any more grain under the elevator now?

A. I should think not.

Q. There may be?

A. No, sir; there may not be.

Q. Is it not just as good as before?

A. No, sir.

Q. Is it not possible that some of this grain you thought ran into the river ran into the adjoining bin?

A. No, sir; it is not.

Q. If any had, you would have discovered it?

A. Yes, sir.

Q. So you have ascertained the exact amount that ran into that bin?

A. Yes, sir,

Q. It could not run in when it was full?

A. It could not run into the bin that was full; it did not run that way.

Q. Did you direct Mr. Cook to make the statement he made here?

A. No.

Q. Do you swear this petition to be true?

A. I suppose it is; if you will show it to me I can tell you in a moment. (Witness is here handed the petition filed in this cause.) Yes.

Q. You have sworn here that Jacob Johnson, at the time you

swore to this, was the sole owner of the tug Parker. Is that true?

68 A. Yes.

Mr. MAGEE: I offer to prove by plaintiff's witnesses here that the petition is false in setting forth that Jacob Johnson was the sole owner of the tug Parker, and also that it is false in setting forth that the "tug Parker" caused the damage, or that there is any tug in the river in this district named "Parker."

The COURT: The offer is excluded and exception by Johnson.

Q. Do you know what amount of storage you lost on this loss of grain.

Objected to; overruled; exception.

A. For the first two days 1¼ each, making the price of the corn $62¼.

Q. Have you calculated interest on this paper?

Objection.

Counsel for defendant moves the court to exclude all this testimony as to the whole charge, because the plaintiff has failed to prove in this case the existence of plaintiff's corporation, the existence of the tug Parker, or that defendant was the sole owner of the tug-boat.

Motion overruled and exception.

The foregoing was all the evidence introduced on the hearing of this cause, and thereupon the court gave to the jury on behalf of the plaintiff the following instruction, to wit: "The jury

69 are instructed that the only questions that they have to determine is the amount of the damages. You have nothing to do with the question as who is the person or what the thing that caused the injury to the elevator. You may return your verdict in the following form:

"We, the jury, assess the damages at ——."

To the giving of which instruction the claimant, Jacob Johnson, then and there excepted.

And the said Jacob Johnson, by his counsel, thereupon asked the court to give to the jury the following instruction, to wit:

"The jury are instructed to find for the defendant."

But the court refused to give the said instruction, to which decission of the court in refusing to give the said instructions the defendant by his counsel then and there excepted, and thereupon the jury returned the aforesaid plaintiff's instruction with the figures $300.00 inserted therein signed by them purporting to be their verdict in the cause.

Whereupon the claimant, Jacob Johnson and James B. Carter, by their counsel, moved the court to set aside the said verdict so rendered and grant a new trial in said cause and filed the said motion and following reasons in writing:

Attachment of Water Craft.

70 STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. January Term, A. D. 1882.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY } Gen. No. 39168.
vs. } Term No. 7527.
THE TUG "PARKER."

And now comes Jacob Johnson, who has been summoned by Magee and Adkinson, his attorneys, and moves the court to set aside the verdict rendered and to grant a new trial in this cause, and for grounds of his motion the said Johnson shows to the court the following, to wit:

1st. The court erred in refusing to set aside the default of Jacob Johnson and allowing an affidavit of merits to be filed with the demurrer therein.

2nd. The court erred in not allowing the motion of Johnson to set aside the default and to file his sworn answer and affidavit of merits in said cause.

3rd. The court erred in not sustaining the motion of Johnson to dismiss the petition in said cause for want of jurisdiction.

4th. The court erred in not permitting James B. Carter, part owner of said tug, to interplead and to defend in said cause upon the sworn plea and affidavit of merits filed by him therein.

71 5th. The court erred in refusing to admit proper evidence offered on the cross-examination of the witness, Harper; that is to say, evidence that there was and is no such tug in Illinois as the "Parker" by name, and that Jacob Johnson was not sole owner of said tug, and that the petition filed herein and sworn to by the said witness, Harper, was false in that regard.

6th. The court improperly gave to the jury the instruction given.

7th. The court improperly refused the instruction offered by the claimant, Johnson.

8th. The court improperly directed the instruction which had been given to be mutilated by the clerk after the jury had returned the same into court.

9th. Because no proper verdict was rendered by a jury in said cause.

10th. Because the court improperly permitted the clerk of the court to mutilate the paper which was returned into court and purported to be the verdict of the jury.

11th. Because this claimant was surprised by the evidence of the witness, Harper, in swearing falsely as to the market value of corn at the time the alleged loss occurred in estimating the damages in said cause.

12th. Because the verdict is contrary to the law and evidence in the case.

72 By MAGEE AND ADKINSON,
Attorneys for the Claimant, Jacob Johnson, and Attorneys for the Intervening Claimant, James B. Carter.

And, upon the hearing of the said motion, read and filed certain affidavits, which were all the evidence heard by the court thereon.

Aff'ts of Jacob Johnson.

STATE OF ILLINOIS, }
Cook County, } *ss:*

Circuit Court of Cook County. January Term, A. D. 1882.

CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
THE TUG PARKER.

STATE OF ILLINOIS, }
Cook County, } *ss:*

Jacob Johnson, of said county and State, being first duly sworn, on his oath, says that he was present at the assessing of the damages in the above-entitled cause, and that the court gave but one written instruction to the jury, and that the said instruction was returned into court by the jury signed by them individually; that thereupon the clerk of the court, against the protest and ob-
73 jection of Mr. H. W. Magee, attorney herein of this affiant and one of the claimant-, tore the said instruction in two pieces, and proceeded to write and endorse upon the back of one of said pieces the word "verdict," with his file-mark, and upon the other the words "instr's given" and also his file-mark.

That the piece of paper on which "instructions given" was marked did not contain all of the written instructions given and read to the jury, but, as filed, is mutilated, and only contains part of such instruction.

Affiant further says that the single half-sheet of paper on which the jury wrote their names and which purported to be their verdict, but which in fact contained no other words than the instruction read to the jury and the names of the jurymen, with the words "Foreman and C. and P. E. Co. *vs.* Johnson," was, upon the return of the said paper into court and against the objection of the attorney for one of the claimants in this cause, and without the direction or the authority of the jury, torn into two pieces by the clerk of the court, one of which, as torn, made an apparent verdict, and was so marked, and the other an apparent instruction, and was marked "instruc-
74 tion" by the clerk of said court, but which was not the instruction given and read to the jury, nor the paper returned into court as a verdict signed by the jury. And further affiant saith not.

JACOB JOHNSON.

Subscribed and sworn to before me this 11th day of February, A. D. 1882.

JACOB GROSS, *Clerk.*

Attachment of Water Craft.

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County. January Term, A. D. 1882.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
THE TUG PARKER.

STATE OF ILLINOIS, *Cook County:*

Jacob Johnson, of said county and State, being first duly sworn, on his oath says that he was present on the trial of this cause, or, rather, the assessing of the damages therein; that the petitioner in this cause claimed damages on account of the loss of a large quantity of what is commonly known as No. 2 corn on the night of the fourth day of August, A. D. 1881; that the loss of the said corn
75 constituted by far the largest amount of damages claimed; that the maket price of such corn is fluctuating at different seasons of the year; that the same is generally determined by the price of that article among the dealers therein upon the board of trade in the city of Chicago; that the current market price thereof is kept for the information of the members of the said board; that printed circulars are daily issued by parties in the said city of Chicago showing the ruling prices for such cereals during every business day of the year of the said board of trade, and is well known by all elevator proprietors upon inquiry; that affiant had no reason to believe but that the same was well known by the witness Harper, was the only witness on behalf of the plaintiff as to the value of the said corn, and he so testified that he knew, and then testified that the said corn was worth the sum of sixty-one cents per bushel at that time when the said loss occurred; that affiant was suprised at such swearing and was wholly unprepared to meet the same; that affiant relied upon his belief that on the question of the price of grain upon any day or days when there was no unusual commotion in the market, and which was subject to absolute demonstra-
76 tion and the knowledge of all men, that the truth and the facts would be given, but that the said witness, Harper, recklessly testified to a price at which there is no record upon the board of trade of any "No. 2 corn" being sold as upon that day; that affiant has examined circulars of the price of No. 2 corn on the said fifth day of August and finds the same quoted at 53½ to 53¾; that upon a new trial of this cause affiant will be able to show that "No. 2 corn" was worth on the market on the said fifth day of August, A. D. 1881, but the sum of 53½ cts. per bushel, as shown by the annexed Daily Commercial Bulletin, and that the said bulletin is a fair and correct representation of the corn market of Chicago, Illinois, on the said day and was regularly issued in the ordinary course of business and is a reliable medium for ascertaining the commercial transactions in corn on the market in said city of Chicago; that the

corn lost could have been replaced on that day at the aforesaid price by the pl'ffs.

And further affiant saith not.

JACOB JOHNSON.

Subscribed and sworn to before me this 11th day of February, A. D. 1882.

JACOB GROSS, *Clerk.*

77 Attached hereto is a copy of the "Daily Commercial Bulletin, second edition, 2 p. m., dated Chicago, Friday, August 5th, 1881."

STATE OF ILLINOIS, } *ss:*
Cook County, }

Circuit Court of Cook County. October Term, A. D. 1881.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
THE TUG PARKER.

Henry W. Magee, of said county and State, being first duly sworn, on his oath says that he is the attorney of the defendant who has charge of this cause; that he was employed by the defendant or claimant, Jacob Johnson, to defend the above-entitled cause in his behalf; that affiant, after being so retained by Jacob Johnson, examined the files in this action and made particular examination of the bond and petition filed herein, and became satisfied that the petition was so indefinite and informal that the defendant or claimant Johnson would not be required to file an affidavit of merits with his demurrer herein, and consequently did not go to the office of the said defendant to have such an affidavit made or pro-
78 cure it to be made; that this affiant, relying upon his belief that the court would take no action upon the said petition and upon the said bond filed herein by the plaintiff when its attention was drawn to them, simply filed the demurrer and exceptions which has been filed herein. Affiant further says that the said demurrer and exception *was* not filed for delay, but because affiant believed that the grounds stated therein were well taken.

Affiant further says that upon learning that a motion would be made in this cause for a default as against the defendant Johnson for want of an affidavit of merits he at once procured such an affidavit from the said Johnson, and, before the said default had been taken, asked leave of the court to file such affidavit of merits on behalf of and by the said Johnson in this cause.

Affiant further stated that he believed that the court would not take default upon demurrer filed without an affidavits of merits unless the petition filed was itself drawn and sworn to in accordance with the statute in such case made and provided, and affiant says that the name "Parker" is not the name of the tug-boat attached in this cause, as appears from her enrollment, which is herewith shown to the

court, and affiant says that he has made examination of the
79 names of the water craft, as appears in the list published by the Treasury Department of the United States, and finds, among others, the following: "Gracie M. Parker," "J. D. Parker," "Jason Parker," "Joseph Parker," "Leah Parker," "Mary Parker," "Sallie Parker," "Sam'l Parker." "Sophie Parker," "James Parker," "Eliza R. Parker," "Chas. W. Parker," "Asher S. Parker," "Alice Parker," "Addie Parker," "Geo. H. Parker," "Geo. O. Parker," and no craft named Parker appears therein, and that the said statute required that "the name of the water craft" should be stated in such petition and that such petition should be verified by affidavit.

Affiant further says that the ownership of the tug attached and her true name appears in the public records of the United States Treasury Department, at the city of Chicago, in said county and State, and are accessible to the agent of the petitioner herein, and could readily have been ascertained if the petitioner and its agent had not, in their hot haste for an attachment and recklessness of statement, preferred to swear it through rather than examine the records for the truth thereof. And further affiant saith not.

HENRY W. MAGEE.

Subscribed and sworn to before me this fourth day of November, A. D. 1881.

[NOTARIAL SEAL.] J. FRANK RICHMOND,
Notary Public.

80 But the court denied the motion and gave judgment on the verdict, and caused the same to be rendered against Jacob Johnson and his surety, Henry A. Christy, said Christy being surety on a certain bond filed in said cause for the release of said tug, for the *same* mentioned in said verdict and costs of suit; to which decision of the court in denying the said motion and in the rendition of the said judgment this claimant and his coclaimant, James B. Carter, and his said surety, by their counsel, then and there excepted.

Whereupon the said Jacob Johnson, James B. Carter, and Henry A. Christy prayed an appeal to the appellate court of Illinois for the first district, which the court granted.

And forasmuch as the matters above set forth do not fully appear of record the said parties tender this their bill of exceptions, and pray that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made, which is accordingly done this third day of March, A. D. 1882.

T. A. MORAN, *Judge.* [SEAL.]

And thereupon, on the 11th and 13th days of March, A. D. 1882, the following proceedings were had and entered of record in said cause, to wit:

81 *Attachment.*

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat Parker, and TUG-BOAT PARKER. } 39168. 7527.

MARCH 11TH, '82.

On motion of the appellants, Jacob Johnson and Henry A. Christy, by their attorney, it is ordered that the time in which to file appeal bond in such cause be and it is extended until 10 o'clock in the forenoon of the 15th instant.

Attachment.

THE CHICAGO AND PACIFIC ELEVATOR COMPANY
vs.
JACOB JOHNSON, Owner of Tug-boat Parker, and TUG-BOAT PARKER. } 39168. 7527.

MARCH 13TH, '82.

On motion of said defendants, by their attorney, leave is granted them to file herein copies of three affidavits lost from the files of said cause, one of said affidavits to be filed *nunc pro tunc* as of October 21st, 1881, and the other two *nunc pro tunc* as of October 31st, 1881.

And thereupon, on the 13th day of March, A. D. 1882, there was filed in said cause a certain appeal bond in the words and figures following, to wit:

82 Know all men by these presents that we, Jacob Johnson, Henry A. Christy, [and] James B. Carter, principals, and Jerome B. Osier, surety, of the county of Cook and State of Illinois, are held and firmly bound unto the Chicago and Pacific Elevator Company, also of the same county and State, in the penal sum of four hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and firmly by these presents.

Witness our hands and seals this 9th day of March, A. D. 1882.

The condition of the above obligation is such that whereas the said Chicago and Pacific Elevator Company did, on the 11th day of February, A. D. 1882, in the circuit court of Cook county, in the State aforesaid, and of the January term thereof, A. D. 1882, recover a judgment against the above-bounden Jacob Johnson and Henry A. Christy for the sum of three hundred dollars and — cents, besides costs of suit, from which said judgment of the said circuit court of Cook county the said Jacob Johnson, Henry A. Christy, and James B. Carter hav- prayed for and obtained an appeal

83 to the appellate court within and for the first district of said State:

Now, therefore, if the said Jacob Johnson, Henry A. Christy, and James B. Carter shall duly prosecute their said appeal with effect,

and, moreover, pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against said Jacob Johnson and Henry A. Christy, in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

JACOB JOHNSON. [SEAL.]
JAS. B. CARTER. [SEAL.]
H. A. CHRISTY. [SEAL.]
J. B. OSIER. [SEAL.]

Taken and entered into before me at my office in Chicago this ninth day of March, A. D. 1882.

T. A. MORAN, *Judge.*

84 STATE OF ILLINOIS, } ss:
Cook County, }

I, Jacob Gross, clerk of the circuit court of Cook county, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the common law side thereof, between The Chicago and Pacific Elevator Company, plaintiff, and Jacob Johnson, owner of the tug-boat Parker, and tug-boat Parker, defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 16th day of March, 1882.

[Seal Circuit Court, Cook County, Illinois.]

JACOB GROSS, *Clerk.*

Assignment of Errors.

CHICAGO AND PACIFIC ELEVATOR COMPANY *vs.* TUG PARKER.

Attachment of water craft.

85 The court erred in not permitting the said Jacob Johnson to file the affidavit of merits *nu-c pro tunc* of date of demurrer filed.

The court erred in not allowing said Jacob Johnson's answer and affidavit of merits to be filed.

The court erred in admitting improper evidence and refusing proper evidence.

The court erred in not setting aside default of Johnson.

The court erred in not allowing said James B. Carter to appear and defend in said cause.

The court erred in giving the instruction given.

The court erred in trying said cause out of its order.

The court erred in not granting a new trial thereon.

The court erred in not dismissing said cause upon the motion made.

The court erred in entertaining jurisdiction of said cause.

The court erred in entering judgment against Henry A. Christy and Jacob Johnson.

MAGEE AND ADKINSON,
Attorneys for Jacob Johnson, Henry A. Christy, James B. Carter.

86 In the Appellate Court, First District, Illinois. Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } No. 1300.

I, Eli Smith, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached, and marked "A," is the original transcript of record filed in said appellate court on the 16th day of March, A. D. 1882, by said Jacob Johnson *et al.*

In testimony whereof I have hereunto set my hand and seal of said court at Chicago, this 26th day of July, A. D. 1882.

[SEAL.] ELI SMITH,
Clerk of the Appellate Court, First District, Illinois.

87 And afterwards, to wit, on the 5th day of September, A. D. 1882, there was filed in the office of the clerk of said supreme court a certain transcript of the record and proceedings of the appellate court of Illinois, first district, with the assignment of errors thereon, which said transcript and errors assigned thereon are in words and figures following, to wit:

88 At a term of the appellate court begun and held at Chicago on Tuesday, the seventh day of March, in the year of our Lord one thousand eight hundred and eighty-two, within and for the first district of the State of Illinois.

Present: Hon. Isaac G. Wilson, presiding justice; Hon. Joseph M. Bailey, justice; Hon. Wm. K. McAllister, justice.

Appeal — Cook Circuit.

JACOB JOHNSON, JAMES B. CARTER, HENRY A. CHRISTY, and TUG-BOAT "PARKER"
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } No. 1300.

Be it remembered that on the 1st day of April, A. D. 1882, the same being one of the days of the March term, A. D. 1882, the following motion and affidavits *was* filed in said cause, to wit:

Appeal — Cook Circuit.

89 JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

And now comes the appellee herein, by Messrs. Rae and Smith,

its attorneys, and files the affidavit of Wm. H. Harper and moves the court that the said appeal be dismissed with damages, because, it says:

1st. That the appeal bond filed in the court below was, after said bond was fully executed and approved by the court, materially changed and altered without the knowledge, consent, or approval of said James B. Carter or any one lawfully authorized to change or alter said bond.

2nd. Because the said appeal was prayed by and allowed to said Jacob Johnson, Henry A. Christy, and James A. Carter jointly, and that said Carter has not and did not join in signing the appeal bond or perfecting the appeal and no writ of severance was sued out.

3rd. Because said appeal bond was altered, changed, and modified in material part after it was approved by the court.

4th. Because said appeal bond does not properly recite the judgment appealed from.

90 5th. Because said abstract of record was not filed in proper time and in accordance with the statute in such case made and provided.

6th. Because the judgment appealed from was rendered February 11th, 1882, and more than twenty days before the sitting of the court to which the appeal was taken, to wit, March 7th, 1882, and no authenticated copy of the record of the judgment appealed from was filed in the office of the clerk of this court, this being the court appealed to, on or before the 2nd day of the succeeding term of this court, to wit, March 8th, 1882.

7th. Because this case has at the special instance and request of appellant and for the purpose of misleading the court been improperly entered on the docket of this court.

8th. Because the transcript of the record filed herein as certified to by the clerk in the lower court, and which certificate was wrongfully caused to be made by appellant, is that of a case wherein said appellee was plaintiff and Jacob Johnson, owner of the tug-boat Parker, and Tug-boat Parker were defendants; whereas in this case Jacob Johnson was the only defendant.

RAE AND SMITH,
Attorneys for Appellee.

91 Messrs. Magee and Adkinson, attorneys for appellant:

Please take notice that on Monday, April 10th, 1882, at 10 a. m., or as soon thereafter as said appellate court shall convene and counsel can be heard, we shall present to the court the above affidavit and motion, and ask the court to sustain said motion for the reasons above set forth.

Dated March 29th, 1882.

RAY AND SMITH,
Attorneys for Appellee.

Served the above affidavit, motion, and reasons for sustaining motion, and said notice on said Magee and Adkinson by delivering

to said Adkinson true and correct copies thereof this March 30th, 1882.

J. L. MARKS.

Subscribed and sworn to before me this March 30th, 1882.

[NOTARIAL SEAL.] JOHN S. MILLER,
Notary Public.

Wm. H. Harper, on oath, doth depose and say that he is the secretary and agent of said plaintiff; that affiant is informed and truly believes that on March 9th, 1882, an appeal bond was taken and entered into before His Honor Judge Moran, and in said cause, as set forth on pages 106, 107, 108 of the abstract of record filed
92 in this cause, except that the last word on the 3rd line from the bottom on the 107 page and all of the 2nd line from the bottom of said page, and being the sentence "said Jacob Johnson and Henry A. Christy," was not contained therein, but in the place of said sentence was the word "them;" that afterwards, to wit, March 13th, 1882, the word "them" was stricken out and said sentence "said Jacob Johnson and Henry A. Christy" inserted in its place, and that said change and alteration was made without the knowledge, consent, or permission of said Carter or any one lawfully authorized to make it, which said change and alteration affiant is informed and believes would make said bond void as to said Carter, and said Carter not a party to said appeal, and the appeal bad as to all, as said appeal was prayed and allowed jointly and was joint.

Affiant further says that he is informed and verily believes that at the instance and request of the attornies for said Jacob Johnson, defendant, and to mislead the court, the clerk of this court or his lawful deputy has been induced to and did entitle said cause in and enter the same on the docket of this court as though the tug-boat Parker was defendant, and which is not the case.

93 Affiant further says, upon information and belief, that said attornies for said Johnson induced Jacob Gross, clerk of this circuit court, to and he did certify that the transcript of record filed herein is that of a certain cause, &c., between the Chicago and Pacific Elevator Company, plaintiff, and Jacob Johnson, owner of tug-boat Parker, and Tug-boat Parker, defendants, when in fact there was and is no such suit.

WM. H. HARPER.

Subscribed and sworn to before me this 29th day of March, 1881.

[NOTARIAL SEAL.] J. L. MARKS,
Notary Public.

And thereupon, on the 10th day of April, A. D. 1882, the following objections to said motion *was* filed in said cause, to wit:

Appeal—Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

And now comes Jacob Johnson, Henry A. Christy, and James B. Carter, respectively, by Magee and Adkinson, their respective attorneys, and objects to the motion to dismiss by appellees of
94 their respective appeals and state the following objections:

1st. Each party was granted an appeal upon filing that bond.

2nd. The bond as changed should be brought up by supplemental record, so as to show the action of the court below on the bond.

3rd. The court below approved the bond after the change.

4th. The bond was good without the change, if any was made.

5th. The change was at the request and in compliance with directions of appellee and under instruction of the court, and was not filed in the cause until after the court below had examined the change and the ratification thereof on the back of the bond.

The parties appealing are ready and willing and offer to file and give any bond the court may require in the cause.

7th. "No appeal shall be dismissed by reason of informality or insufficiency of the appeal bond," &c. Sec. 70, chap. 110, Rev. Statutes, Practice Act.

8th. The affidavit filed is only on information and belief.

9th. The copy of the bond before and after the change and the ratification on the back of the said bond ought to be submitted to this court by appellee.

95 The record was filed in time. The last day of the February term was the 18th of February, 1882, and record filed the 16th March, 1882.

Appellee's counsel has been wasting his time on the old law and not on the new law. See section 73, practice act, Rev. Statutes, 1881.

The title of cause, as near as we can name, the hermaphrodite, is as the clerk of the court below named it; we had nothing to do with it. To be safe we here put in the name of parties and the thing proceeded against.

The name of the case in its courts, and the chapter under which it is brought, we think it sufficiently identified, and trust the court will overrule the motion.

MAGEE AND ADKINSON,
Attorneys and Proctors for Appellants.

Jacob Johnson, of said county and State, being first duly sworn, on his oath says that he is informed and believes that the appeal bond in this cause was duly signed, and appeared in open court, by the Hon. Thomas A. Moran, on the 9th March, A. D. 1882, but *but* before the same was filed the court suggested that it be submitted to counsel for appellees; that it was so submitted, and that when

shown to the court again, counsel for appellee- being present,
96 he objected that the word them therein ought [to] be changed and the words "said Jacob Johnson and Henry A. Christy" inserted in place thereof.

That thereupon the bond was so changed, and the approval of the security, and the principles, Jacob Johnson and Henry A. Christy, to the change endorsed upon the back of said bond, when it was again submitted to the court on the 13th of March, A. D. 1882, and shown to the court that the other party, Captain James B. Carter, who had already been brought from the State of Michigan to sign the bond as originally drawn, had returned to Michigan, and that the other parties on the bond were worth many thousands of dollars, and that the approval of James B. Carter could be subsequently had if desired to the change as made therein; that thereupon the said court approved the bond and permitted it to be then and there filed in said cause, but did not change the date of the former approval endorsed thereon; that each and all of the said parties are ready and willing to file any good and sufficient bond herein if the said bond be held not sufficiently formal or otherwise insufficient as this honorable court shall direct.

JACOB JOHNSON.

Subscribed and sworn to before — this eighth day of April, A. D. 1882.

[NOTARIAL SEAL.] J. FRANK RICHMOND.
Notary Public.

97 And thereupon on the same day, to wit, April 10th, 1882, the following proceedings were had and entered of record in said cause, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
THE CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

This day came said appellee, by its counsel, and moved the court to dismiss said appeal, and the court not being fully advised in the premises doth take said motion under advisement, and leave is granted said appellee to file his briefs on or before April 23, inst., as per stipulation.

And thereupon, on the 23rd day of May, A. D. 1882, the following objection to the dismissal of said cause was filed, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

And now again comes the appellants, by Magee and Adkinson, their attorneys, and objects to the dismissal of said cause, and asks

to have the said motion to dismiss the appeal herein, as heretofore made, overruled, and as to the additional cause assigned states
98 the cause is a trespass and does not involve validity of a statute necessarily. The appeal does not necessarily raise a constitutional question.

The court below failed to obtain jurisdiction to default the defendants in manner it did because the bond and petition of appellee were not in compliance with said statute.

This objection comes too late. The argument of appellee has been filed and only the argument to be heard to close the case.

H. W. MAGEE,
Attorney for Appellant.

And thereupon, on the 23d day of May, A. D. 1882, the following motion was made and filed in said cause, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

And now again comes said appellee, by Rae and Smith, its said attorneys, and renews the motion heretofore made in said cause to have the said appeal dismissed, with damages, etc., and offers in support of said motion, in addition to the causes already assigned, the following, viz:

That this court has not jurisdiction of said cause, because the validity of a statute is involved and the appeal raises a constitutional question.

RAE AND SMITH,
Attorneys for Appellee.

99 And thereupon, on the 25th day of May, A. D. 1882, the following proceedings were had and entered of record in said cause, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

Said court having considered the motion of appellees to dismiss said appeal doth reserve their decision until the final hearing of said cause.

And thereupon, on the 16th day of June, A. D. 1882, the following proceedings were had and entered of record in said cause, to wit:

100 *Appeal — Cook Circuit.*

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

Said cause having this day been reached in the call of the docket and neither party appearing to argue the same, and the court not being fully advised in the premises, doth take said cause under advisement.

And thereupon, on the 25th day — July, A. D. 1882, the following order of affirmance was made and entered of record in said cause, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON, JAMES B. CARTER, HENRY A. CHRISTIE, and TUG-BOAT PARKER
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the
101 premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error; therefore, it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said Chicago and Pacific Elevator Company recover of and from the said Jacob Johnson *et al.*, appellant-, its costs by it in this behalf expended, to be taxed, and that it have execution therefore.

And thereupon, on the same day, to wit, July 25th, A. D. 1882, the following proceedings were had and entered of record in said cause, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

On this day came again said appellants, by their counsel,
102 and moved the court for an appeal in said cause to the supreme court of Illinois, and the court, not being fully advised in the premises, doth take said motion under advisement.

And thereupon on the same day, to wit, July 25th, A. D. 1882, the following petition was filed praying an appeal in said cause, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY.

To the honorable judges of the appellate court in and for the first district.

The appel-ants in the above-entitled cause, by Magee and Adkinson, their attorneys, respectfully pray that an appeal may be allowed from the order and judgment of this court affirming the judgment of the circuit court, upon the ground that the said cause as appears by the record herein involves such questions of law of such importance, and of the validity of statutes that it should be passed upon by the Supreme Court; and your petitioners will ever pray.

MAGEE AND ADKINSON,
Attorneys for Petitioners and Appellants.

103 And thereupon, on the 27th day of July, A. D. 1882, th- same being in vacation after the March term, A. D. 1882, the following proceedings were had and entered of record in said cause, to wit:

Appeal — Cook Circuit.

JACOB JOHNSON *et al.*
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY. } 1300.

This day came appellants in the above-entitled cause, and the undersigned, two of the justices of said court, having duly considered the petition heretofore filed herein praying an appeal to the Supreme Court, and being fully advised in the premises, doth find that said cause involves questions of law of such importance, both on account of principal and collateral interests, and in reference to the validity of certain statutes, as that they should be passed upon by the Supreme Court. It *it* therefore ordered that the prayer of said petitioners in said petition be granted, and that such appeal be, and the same is, hereby allowed to the Supreme Court, upon said appellants filing a bond of five hundred dollars herein, with Jerome B. Osier as surety therein, within twenty days from date.

104 W. K. McALLISTER,
ISAAC G. WILSON,
Justices Appellate Court, First District Illinois.

And thereupon, on the 27th day of July, A. D. 1882, the following appeal bond was filed in said cause, which bond is in the words and figures following, to wit:

Know all men by these presents that we, Jacob Johnson, James B. Carter, and Henry A. Christy, all of Cook county and State of Illinois, as principal-, and Jerome B. Osier, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto the

Chicago and Pacific Elevator Company, a corporation of also the same State, in the penal sum of five hundred ($500.00) dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 27th day of July, A. D. 1882.

The condition of the above obligation is such that whereas
105 the said Chicago and Pacific Elevator Company did, on the 11th day of February, A. D. 1882, in the circuit court of Cook county, in the State aforesaid, and of January term thereof, A. D. 1882, recover a judgment against the said Jacob Johnson and Henry A. Christy for the sum of three hundred dollars and — cents, besides costs of suit, from which said judgment of the circuit court of Cook county the said Jacob Johnson, James B. Carter, and Henry A. Christy prayed for and obtained an appeal to the appellate court within and for the first district of said State; and whereas the said appellate court did, on the 25th day of July, A. D. 1882, and at the March term thereof, A. D. 1882, affirm the judgment of the circuit court aforesaid, and did render judgment against the above-bounden Jacob Johnson and Henry A. Christy for costs of suit, from which order of affirmance and judgment of the said appellate court the said Jacob Johnson, Henry A. Christy, and James B. Carter has prayed for and obtained an appeal to the supreme court of the State of Illinois:

Now, therefore, if the said Jacob Johnson, Henry A. Christy, and James B. Carter shall duly prosecute their said appeal with effect, and, moreover, pay the amount of the judgment, costs, inter-
106 ests, and damages rendered and to be rendered against them, or against Jacob Johnson and Henry A. Christy, in case judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise, to remain in full force and virtue.

JACOB JOHNSON. [SEAL.]
JAMES B. CARTER. [SEAL.]
HENRY A. CHRISTY. [SEAL.]
JEROME B. OSIER. [SEAL.]

I, Eli Smith, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of all orders and proceedings of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of the said appellate court at Chicago, this 26th day of July, in the year of our Lord one thousand eight hundred and eighty-two.

[Appellate Court Seal.]

ELI SMITH,
Clerk of the Appellate Court of the First District.

107 *Assignment of Errors.*

The court erred in affirming the judgment of the circuit court.

The court erred in not vacating the judgment of the circuit court

and entering an order allowing James B. Carter, part owner of the tug Parker, to plead and defend against the attachment.

The court erred in affirming a judgment obtained against Henry A. Christy without notice or process to him.

The court erred in assuming jurisdiction over Henry A. Christy without appearance or process, because the law allowing the same is invalid and in violation of the general laws and constitution of Illinois.

The court erred in not vacating the judgment and directing the court below to allow Jacob Johnson to file an affidavit of merits with his demurrer or plead to the merits, the law permitting amendments.

The court erred in not reversing the judgment and directing the court below to consider the demurrer of Johnson without an affidavit of merits therewith, the law requiring the same being
108 invalid and in violation of the general practice law of the State and of the constitution of the State of Illinois.

The court erred in not dismissing the petition and cause for want of jurisdiction in the circuit & appellate courts to enforce a maritime lien *in rem* on a vessel engaged in domestic commerce between the States and duly enrolled and licensed, the statute for enforcing such a lien *in rem* being invalid and in violation of the Constitution and laws of the United States of America, exclusive jurisdiction therefor being in the United States courts.

The court erred in not sustaining the assignment of errors made in court below.

MAGEE AND ADKINSON,
Attorneys for Jacob Johnson, James B. Carter, Henry A. Christy, Appellants.

109 And be it further remembered that, to wit, on the 9th day of September, A. D. 1882, the same being one of the days of the September term of said supreme court, the following proceedings were had and entered of record, to wit:

Appeal from Appellate Court, First District.

JACOB JOHNSON *et al.*
vs.
THE CHICAGO AND PACIFIC ELEVATOR COMPANY.

Now on this day this cause comes on for hearing in the regular call of the docket, and it appearing to the court that a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, have been duly filed, as required by law and the rules of this court in that behalf made and provided, and that this cause is here submitted upon such transcript, abstracts, briefs, and arguments for the consideration and judgment of the court; therefore, it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

110 STATE OF ILLINOIS:

Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa, on Tuesday, the — day of ——, in the year of our Lord one thousand eight hundred and eighty-——, within and for the northern grand division of the State of Illinois.

Present: Hon. John M. Scott, chief justice; Pinkney H. Walker, justice; T. Lyle Dickey, justice; Benj. R. Sheldon, justice; Jno. Scholfield, justice; John H. Mulkey, justice; Alfred M. Craig, justice; James McCartney, attorney general; ——, sheriff; Everell F. Dutton, clerk.

Be it remembered that afterwards, to wit, on the 20th day of November, A. D. 1882, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

Appeal from Appellate Court, First District.

JACOB JOHNSON *et al.*
vs.
THE CHICAGO AND PACIFIC ELEVATOR COMPANY. } No. 51. 666.

Opinion by SHELDON, *J.*:

There are various errors assigned. It is objected that the requirement of an affidavit of a defence upon the merits to be filed with a demurrer is a special law of practice and violates § 22, Art. 4, of the State constitution respecting special legislation. We do not
111 regard this requirement as special legislation. It is general to this class of cases.

It is alleged the petition and bond were insufficient, and that no affidavit of merits could be required until a sufficient petition and bond had been filed. We do not consider the petition defective in the particulars pointed out. The objection to the bond is that it is conditional to pay Johnson such costs and damages as shall be awarded for wrongfully suing out the attachment, instead of to pay the owner or other person interested in the water, craft as the statute requires.

As the boat was bonded on the same day it was attached and not likely any material damage came from the attachment we see nothing substantial in this objection. It is urged that if an affidavit of merits was essential the court should have allowed it to be filed at the time asked. The statute is imperative that such affidavit shall be filed with the demurrer; no sufficient reason was shown for not filing it at the time required; there was an affidavit of the matter of defence filed in support of the motion, but neither that nor anything else appearing in the case disclosed any meritorious defence, more than is here considered and passed upon by us, and we find no error in disallowing the motion. Wilder *vs.* Arwedson, 80 Ill., 435.

112 It is insisted that it was error to refuse the application of Carter to be made a defendant. The bond which had been given by Johnson and Christy, under § 15, bound the obligators to pay all monies which should be adjudged to be due the petitioner, and upon the giving of the bond the boat, under the statute, was restored to the owner, and thenceforth discharged from the lien secured by the bond, unless upon motion the court should order the same again into custody on account of the insufficiency of the surety. And when the water craft has been discharged from custody the only judgment which is rendered is against the principal and surety in the bond.

The part owner then, Carter, at the time he applied to be made defendant, had no interest in the suit, the tug-boat having been discharged, for judgment could not go against him or the boat or in any way affect his rights. The court at the time had no jurisdiction of the tug-boat. It is suggested that the part owner would have an interest in the suit after the boat was bonded; that he would be liable to contribute to pay the judgment; but the principle is that there is no right of contribution between wrong-doers.

We find no error in denying this application of Carter. It is urged that the judgment against Christy, the surety, together with Johnson, the principal in the bond, is void, as Christy was

113 never summoned or appeared in the suit. The statute provides if upon the trial judgment shall pass for petitioner, and the water craft has been discharged, "said judgment or decree shall be rendered against the principal and sureties in the bond." The bond being given with this statute existing, the law entered into the bond & formed a part of it; so that from the entering into the bond there was a virtual consent on the part of the surety that judgment might thus go against him upon the bond, and by virtue of such consent he is bound by the judgment. (Whitehurst *vs.* Coleen, 53 Ill., 247; Hannies *v.* The People, 70 Ill., 100; Buell *v.* New Mexico, 16 Wall., 535.) As to this provision for judgment against the principal and surety being special legislation, the same answer may be made as above in respect to the affidavit of merits; it is the general law as to all bonds of that kind, and so not open to the objection of being special legislation. The most important question is as to the jurisdiction of the court below. It is insisted that the cause of action here was a marine tort, which is of admiralty cognizance, over which the district court of the United States has exclusive jurisdiction under the act of Congress giving such court exclusive jurisdiction of all causes of admiralty and maratime jurisdiction, saving to suitors in all cases the right of a common-law rem-

114 edy where the common law is competent to give it; that the remedy here pursued is a statutory one and not a common-law remedy, and that the statute of this State can confer no jurisdiction on the courts of this State to entertain the proceeding which it provides. We need not inquire how this might be if the tort complained of was a maratime tort, as we do not consider it to be one of that character. It was a tort committed by a vessel and its officers upon a warehouse on land, and so not a marine tort and

within the admiralty jurisdiction. To make it such the locality of the injury must have been on the high seas or other navigable waters. True, the negligence from which the injury resulted occurred on the navigable water of the Chicago river, but the damage done was wholly upon the land; and in such case we do not understand that the fact that the cause of the damage originated on water subject to the admiralty jurisdiction makes the case one for admiralty cognizance. This would seem to be a parallel case with that of "The Plymouth," 3 Wall., 20, where a steam propeller anchored beside a wharf in the Chicago river, owing to the negligence of those in charge, took fire, the flames of which extending to the wharf and certain packing-houses thereon set the last on fire, consuming them and their contents. It was held
that a libel for the tort filed in the admiralty court was
115 properly dismissed for want of jurisdiction. It was then said
that the entire damage occurred not on the water, but on land; that the origin of the wrong was on the water, but the substance and consummation of the injury was on land, and so was not a case within the admiralty jurisdiction.

The same remarks may be truly repeated with reference to the present case. We do not perceive that the cases are distinguishable in principle, and think they should fall within the same rule of decision.

Finding, then, that the tort here complained of was on land and not a maratime tort, and the case not one of admiralty jurisdiction, the remedy we regard as a purely domestic affair, which it was within the competency of the Legislature of the State to give.

We think the motion to dismiss for want of jurisdiction was properly denied.

The judgment will be affirmed.

Judgment affirmed.

116 At a supreme court begun and held at Ottawa, on Tuesday, the —— day of ———, in the year of our Lord one thousand eight hundred and eighty- ——, within and for the northern grand division of the State of Illinois.

Present: ——— ———, chief justice; ——— ———, justice; ——— ———, justice; ——— ———, justice; ——— ———, justice; ——— ———, justice; ——— ———, justice.

———— ————,
Attorney General.
——— ———, *Sheriff.*
——— ———, *Clerk.*

Be it remembered, to wit, on the 20th day of November, A. D. 1882, the same being in vacation, after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

Appeal from Appellate Court, First District.

JACOB JOHNSON, JAMES B. CARTER, and HENRY A. CHRISTY *vs.* THE CHICAGO AND PACIFIC ELEVATOR COMPANY. } No. 666. 51

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error; therefore, it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellants its costs by it in this behalf expended, and that it have execution therefor.

_____ _____,

Clerk of the Supreme Court.

117 At a supreme court begun and held at Ottawa on Tuesday, the sixth day of March, in the year of our Lord one thousand eight hundred and eighty-three, within and for the northern grand division of the State of Illinois.

Present: John M. Scott, chief justice; Pinkney H. Walker, justice; John Scholfield, justice; T. Lyle Dickey, justice; John H. Mulkey, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice.

JAMES McCARTNEY,
Attorney General.
W. R. MILLIGAN, *Sheriff.*
EVERELL F. DUTTON, *Clerk.*

Be it remembered, to wit, on the 21st day of March, A. D. 1883, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

Petition for Rehearing.

Appeal from appellate court, first district.

JACOB JOHNSON *et al.* *vs.* THE CHICAGO AND PACIFIC ELEVATOR COMPANY. } No. 666.

Now, on this day, this cause coming on to be heard upon the petition of the appellants for a rehearing herein, and the court being now duly advised in the premises, it is considered and ordered by the court that said petition for a rehearing be overruled and denied. And it is further ordered by the court that the order staying proceedings heretofore entered herein be now set aside and held for naught. And it is further considered by the court that said petitioner pay the costs and charges herein taxed.

118 STATE OF ILLINOIS, *ss:*

Supreme Court, Northern Grand Division.

I, Everell F. Dutton, clerk of the supreme court in and for the northern grand division of the State of Illinois, do hereby certify that the foregoing is a true copy of the record and proceedings in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Ottawa, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

E. F. DUTTON,
Clerk of the Supreme Court.

119 STATE OF ILLINOIS:

Supreme Court, Northern Grand Division.

To the Honorable John M. Scott, chief justice of said court:

And now come Jacob Johnson, Henry A. Christy, and James B. Carter, by Henry W. Magee, their attorney, and complain that in the record and proceedings herewith submitted and also in the rendition of a judgment in a suit between the Chicago and Pacific Elevator Company, plaintiff, and Jacob Johnson and the steam tug Parker, defendants, *and* James B. Carter, part owner of said tug, was nenied the right to interplead, and judgment in favor of said Chicago and Pacific Elevator Company and against Jacob Johnson and Henry A. Christy, surety, was affirmed in the supreme court of the State of Illinois, in the northern grand division thereof, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against them on the twentieth day of November, A. D. 1882, and a rehearing of said cause was denied on the 21st day of March, A. D. 1883, in said suit, wherein was drawn in question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such its validity, and wherein was drawn in
120 question the construction of a clause of the Constitution of the United States, and the decision was against the right and privilege specially claimed and set up under such clause of the Constitution, all which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said Jacob Johnson, Henry A. Christy, and James B. Carter.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States:

HENRY W. MAGEE,
Attorney for Pl'ff in Error.

Allowed.

JOHN M. SCOTT,
Chief Justice of the Supreme Court of Illinois.

(Endorsed:) Filed April 7, 1883. E. F. Dutton, clerk.

121 Supreme Court of the United States.

JACOB JOHNSON, JAMES B. CARTER, Owners of Tug-boat "Parker," and HENRY A. CHRISTY, Plaintiffs in Error,
vs.
CHICAGO AND PACIFIC ELEVATOR COMPANY, Defendants in Error.

Know all men by these presents that we, Jacob Johnson, James B. Carter, Henry A. Christy, and Charles O. Muzzy, surety, all of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto the Chicago and Pacific Elevator Company, of the State of Illinois, in the sum of five hundred ($500.00) dollars, to be paid to the said Chicago and Pacific Elevator Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 26th day of March, A. D. 1883.

Whereas the above-named Jacob Johnson, James B. Carter, and Henry A. Christy have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Illinois, in the northern grand division thereof:

Now, therefore, the condition of this obligation is such that
122 if the above-named Jacob Johnson, James B. Carter, and Henry A. Christy shall prosecute their said writ of error to effect and answer all costs and damages if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JACOB JOHNSON. [SEAL.]
HENRY A. CHRISTY. [SEAL.]
JAMES B. CARTER. [SEAL.]
CHARLES O. MUZZY. [SEAL.]

Sealed and delivered in presence of—

_____ _____.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

STATE OF ILLINOIS, *Cook County.* } ss:

Charles O. Muzzy, being duly sworn, says that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

CHARLES O. MUZZY.

Sworn to before me this 28th day of March, A. D. 1883.

[NOTARIAL SEAL.] ALBERT J. NORTON,
Notary Public.

I approve the above bond and the sufficiency of the surety thereto.

April 2, 1883.

JOHN M. SCOTT,
Chief Justice of Illinois Supreme Court.

(Endorsed:) Filed April 7, 1883. E. F. Dutton, clerk.

123 UNITED STATES OF AMERICA, *ss:*

JACOB JOHNSON, JAMES B. CARTER, Owners of the Tug-boat "Parker," and HENRY A. CHRISTY, Plaintiffs in Error,
vs.
THE CHICAGO AND PACIFIC ELEVATOR COMPANY, Defendants in Error.

To the Chicago and Pacific Elevator Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, in the northern grand division thereof, wherein Jacob Johnson, James B. Carter, and Henry A. Christy are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Scott, chief justice of the supreme court of the State of Illinois, this 2nd day of April, in the year of our Lord one thousand eight hundred and eighty-three.

JOHN M. SCOTT,
Chief Justice Supreme Court of Illinois.

124 Service of the within citation on the Chicago and Pacific Elevator Company, defendant in error, and Rae & Smith, their attorneys, by copy thereof, this day received. Copy received.

Dated at Chicago, Illinois, this 9th day of April, A. D. 1883.

RAE & SMITH,
Attorneys for Defendants in Error.

125 [Endorsed:] Supreme Court of the United States. Jacob Johnson *et al.*, pl'ffs in error, *vs.* Chicago and Pacific Elevator Company. Citation to October term, A. D. 1883. Filed Apr. 7, 1883. E. F. Dutton, clerk.

126 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court of the State of Illinois, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the

said suit, between the Chicago and Pacific Elevator Company, plaintiff, and Jacob Johnson, James B. Carter, Henry A. Christy, and Tug-boat "Parker," defendants, wherein was drawn in question the validity of a statute of the State of Illinois, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right and privilege specially claimed and set up under such clause of the Constitution, a manifest error hath happened, to the great damage of the said Jacob Johnson, James B. Carter, and Henry A. Christy, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
127 concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there holden, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Chicago, the second day of April, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the 107 year.

[Seal of Circuit Court, U. S., Northern Dist., Illinois, 1856.]

Attest: WM. H. BRADLEY, *Clerk.*

The writ in the above cause may issue and be made a supersedeas.

April 2d, 1883. JOHN M. SCOTT,
Chief Justice of Supreme Court of Illinois.

128 [Endorsed:] Supreme Court of the United States. Jacob Johnson *et al.*, plaintiffs in error, *vs.* Chicago & Pacific Elevator Company, defendant in error. Writ of error. Filed Apr. 7, 1883. E. F. Dutton, clerk.

129 STATE OF ILLINOIS:

Supreme Court, Northern Grand Division.

I, Everell F. Dutton, clerk of the supreme court in and for the northern grand division of the State of Illinois, for return to the foregoing writ of error, do hereby certify the foregoing to be a true copy of the record and proceedings, as above set forth in the cause specified in said writ of error, wherein Jacob Johnson and others are plaintiffs in error, and The Chicago and Pacific Elevator Company is defendant in error, together with said writ of error and the

citation issued thereon and proof of due service of said writs respectively, and the order allowing the same, also the certificate of the Honorable John M. Scott, chief justice of the supreme court of Illinois, and a copy of the appeal bond given by said plaintiffs in error in that behalf, the original of said bond remaining on file in the office of the clerk of said court, and also a copy of the citation and of the writ of error and of the endorsements thereon made, filed in my office by said plaintiffs in error for said defendants in error, remaining therein.

Witness Everell F. Dutton, clerk of said supreme court of Illinois, and the seal thereof, at Ottawa, this 28th day of May, A. D. 1883.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

E. F. DUTTON, *Clerk.*

130 *Assignment of Errors.*

The court erred in not sustaining the exceptions and demurrer of plaintiffs in error to the petition filed.

The court erred in not sustaining the motion of plaintiffs in error to dismiss the said cause & petition for want of jurisdiction in a State court to enforce a lien *in rem* upon a vessel above twenty tons burthen, engaged in domestic commerce between the States, and duly enrolled & licensed in conformity with Title L of the Regulations of the United States.

The court erred in sustaining the validity of a State statute, viz., chapter twelve of the Revised Statutes of Illinois, giving admiralty jurisdiction to enforce maritime liens *in rem* to a State court, the same being repugnant to the Constitution and laws of the United States.

The court erred in sustaining the validity of section 21 of chapter 12 of the Revised Statutes of Illinois, and in rendering judgment against Henry A. Christy without notice or process of law.

The court erred in affirming the judgment below.

HENRY W. MAGEE,
Attorney for Plaintiffs in Error.

Endorsed on cover: Illinois supreme court. No. 308. Jacob Johnson and James B. Carter, owners of the tug-boat "Parker," and Henry A. Christy, plaintiffs in error, *vs.* The Chicago & Pacific Elevator Company. Filed 28th September, 1883.

119-388

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

JACOB JOHNSON,
JAMES B. CARTER,
OWNERS OF TUG BOAT "PARKER," AND
HENRY A. CHRISTY,
Plaintiffs in Error,
vs.
THE CHICAGO & PACIFIC ELEVATOR COMPANY,
Defendant in Error.

IN ERROR TO SUPREME COURT Of Illinois.

No. 65.

BRIEF AND ARGUMENT

FOR PLAINTIFFS IN ERROR

—BY—

HENRY W. MAGEE.

F. C. Cramer, Printer, 165 West Adams Street, Chicago.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

JACOB JOHNSON,
JAMES B. CARTER,
OWNERS OF TUG BOAT "PARKER," AND
HENRY A. CHRISTY,
Plaintiffs in Error,
vs.
THE CHICAGO & PACIFIC ELEVATOR COMPANY,
Defendant in Error.

IN ERROR TO SUPREME COURT Of Illinois.

No. 65.

STATEMENT.

This action is brought to this Court to test the validity of a certain amphibious statute of the State of Illinois, entitled, "Attachment of Water Craft"—by which law it is thought Admiralty jurisdiction and practice is adopted by the courts of that State. The entire chapter is given herein, for the convenience of the Court.

The action arose out of the facts that the schooner G. C. Trumpf ran her jibboom into the side of the elevator of the defendant company, located on or over the river's edge—a slight frame structure—by means of which a small quantity of corn in a bin of the elevator ran out into the river. The Trumpf was at the time, or shortly before had been, in the tow of the steam tug Charles W. Parker, under the command of Captain James B. Carter, one of her owners. Whose fault

it was, has never been determined, as the case was never tried on its merits; both owners being denied a hearing under alleged default, by one of the unique provisions of the law and its construction by the Court. A Libel, or Petition was filed in the Circuit Court of Cook County by the Defendant in Error praying an attachment against the tug boat "Parker," and asking the Court to subject her, with her tackle, apparel and furniture, to a lien for the damages occasioned by the jibboom of the Trumpf. Only *one* of the owners was named in the libel—Jacob Johnson—and he was sworn to be "the owner of said tug boat." The other owner, her master, in charge at the time, Captain James B. Carter, was not made a defendant or allowed to interplead.

Johnson at once bonded the .boat, with Henry A. Christy as surety, on an ordinary bond, shown on page 6 of transcript, and filed a special demurrer or exception, setting out among other things, that the Court was without jurisdiction *to create* or *enforce a lien* upon the said steam tug boat, but failed to file an affidavit of merits with his demurrer, as required by sec. 19 of the Act. Before default was taken, however, he moved for leave to file an affidavit of merits (page 8 of transcript), but the Court overruled this motion and his default was entered.

Motion to vacate the default, supported by affidavits (pages 15 and 16 of transcript) was made by Johnson, and overruled.

Captain James B. Carter then, on the threshold of the proceeding, endeavored to interplead and be made a joint defendant under secs. 11 and 20 of the Act, as a "person interested in the property attached," supporting his application by affidavit and offering indemnifying bond, but the Court denied him that right, to which he excepted. Johnson then moved to dismiss the petition upon a showing to the Court that "the said tug Charles W. Parker, attached by the

"name of 'Parker,' is a steam vessel of above twenty "tons burthen, duly enrolled and licensed in conformity "with Title 'L' of 'Regulations of Vessels in Domestic Com- "merce' of the Revised Statutes of the United States, and "was and now is engaged in the business of domestic com- "merce and navigation upon the navigable waters of the Uni- "ted States of America, and that exclusive jurisdiction to *en- "force* a lien *in rem* on said vessel, as prayed for, is in the Dis- "trict Courts of the United States of America." This motion was overruled, and Johnson excepted. Damages were then assessed at three hundred dollars, and judgment was rendered for that amount against Johnson and also against Henry A. Christy, the surety on the bond; the latter never appearing, or having notice of the action of the Court.

Appeals were prayed and allowed to the Appellate Court for the First District of Illinois—

By Johnson, part owner, who had been summoned, but could not get heard.

By Carter, part owner, who tried to interplead and defend the *res* in which he was interested.

By Christy, the surety, who had signed an ordinary bond only to learn it could, like a stipulation in admiralty, be turned into a judgment simultaneously against principal and surety, and contrary to the letter and law of his contract.

The Appellate Court affirmed the decision, but as the amount involved was less than one thousand dollars, a majority of the Court signed a certificate that "the said "cause involves questions of law of such importance, both on "account of principal and collateral interests, and in refer- "ence to the validity of certain statutes, as that they should "be passed upon by the Supreme Court," and allowed the

case to be appealed to the Supreme Court by all of the said parties. The Supreme Court affirmed the judgment—denied the petition for rehearing; but the Chief Justice allowed the writ of error prayed for by Johnson, Carter and Christy, who bring the cause to this Court.

ASSIGNMENT OF ERRORS.

The Court erred in not sustaining the exception and demurrer of plaintiffs in error to the petition filed.

The Court erred in not sustaining the motion of plaintiffs in error, to dismiss said cause and petition for the want of jurisdiction in a State Court *to enforce* a lien *in rem* upon a vessel above twenty tons burthen, engaged in domestic commerce between the States, and duly enrolled and licensed in conformity with Title L. of the "Regulations of Vessels in Domestic Commerce" in the Revised Statutes of the United States.

The Court erred in sustaining the validity of a State statute, viz., chapter 12 of the Revised Statutes of Illinois giving admiralty jurisdiction *to enforce* maritime liens *in rem* to a State Court, the same being repugnant to the Constitution and Laws of the United States.

The Court erred in sustaining the validity of section 21, chapter 12, of the Revised Statutes of Illinois, and in rendering a judgment against Henry A. Christy without notice or process of law.

The Court erred in affirming the judgment below, and thereby denying James B. Carter, part owner, a hearing.

BRIEF.

The "Attachment of Water Craft" Act is invalid in attempting to *create* and *enforce a lien in rem* against a vessel engaged in domestic commerce upon the navigable waters of the United States of America, above twenty tons burthen, duly enrolled and licensed. Exclusive jurisdiction for that purpose is in the District Court of the United States.

Sec. 2, Art. III, Constitution of the United States.

Sub. 8—Sec. 563, Title XIII, Revised Statutes of the United States—"The Judiciary."

Hine vs. *Trevor*, 4 Wall., ~~574~~ 575

The Moses Taylor, 4 Wall., ~~570~~ 411

The Belfast, 7 Wall., 646.

The Edg 5 Wall., ~~28~~ 481

The Lottowana, 21 Wall., 567.

Weston vs. *Morse*, 40 Wis., 459.

In re Josephine, 39 N. Y., 22.

And cases cited in Bump's Federal Procedure, page 70.

The Legislature had not the power to confer upon the Circuit Courts jurisdiction to enforce a lien on vessels duly enrolled and licensed by the United States, by proceedings *in rem*, according to the procedure of Admiralty Courts.

Weston vs. *Morse*, 40 Wis., 459

Campbell vs. *Sherman*, 35 Wis., 103.

The John Richards, 1 Newberry, 73.

The Golden Gate, 1 Newberry, ~~277~~ 296

Leon vs. *Galceran*, 11 Wall., 185.

The Lottowana, 21 Wall., 567.

The Edith, 4 Otto, 518.

Ferran vs. *Hasford*, 54 Barb., 209.

The Edith, 5 Benedict, 439.

The rendition of a judgment against Henry A. Christy, surety on the attachment bond, without any suit, issue, trial, hearing, presence, or representation by attorney or otherwise, amounted to a deprivation of property without process of law.

Article V, Amendments to the Constitution of the United States.

The denial to James B. Carter, part owner, of the right to interplead and defend, was a violation of that provision of the Constitution of the United States providing that "No "person shall be deprived of life, liberty or property without "due process of law."

Art. V, Constitution U. S.

The provisions of the Act entitled "Attachment of Water Craft" of the State of Illinois amount to a "regulation of commerce," which gives to the ports of Illinois a State Admiralty proceeding, enforceable in its Courts alone, and in violation of that provision in the Constitution of the United States, which provides:

"No preference shall be given by any regulation of com-"merce to the ports of one State over that of another."

Sub. 6 of Section 8, Article I, Constitution of the United States.

"American admiralty has jurisdiction of all cases of "maritime liens."

Benedict's Admiralty, sec. 261.
Henry's Admiralty, 27.

[*162

CHAPTER 12.

ATTACHMENT OF WATER CRAFT.

SECTION
1. For what lien given.
2. Lien on goods for freight.
3. Limitations.
4. Petition—form.
5. Bond—suit on the same.
6. Writ of attachment—names of defendants.
7. Form of writ.
8. Execution of writ—return.
9. Only one attachment allowed.
10. Notice by publication and mail.
11. Intervening creditors, etc.
12. Bond by intervenor.
13. When intervening petition may be filed—proceedings.
14. Liens not filed, to cease.
15. Bonding vessels.

SECTION
16. Appraisement—restitution—sale.
17. Order of restitution, etc.
18. Additional security.
19. Answer—affidavit of merits—default.
20. Amendments—new parties, etc.
21. Judgment when vessel discharged.
22. Judgment when vessel in custody.
23. Order of sale.
24. Proceedings on sale.
25. Bill of sale—form—evidence—effect.
26. Distribution.
27. Remnants.
28. Power of court in distribution.
29. Appeal—error.

AN ACT to revise the law in relation to attachments of boats, vessels and rafts. [Approved March 25, 1874. In force July 1, 1874.]

1. FOR WHAT LIEN GIVEN.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That every sail vessel, steamboat, steam dredge, tug boat, scow, canal boat, barge, lighter, and other water craft of above five tons burthen, used or intended to be used in navigating the waters or canals of this state, or used in trade and commerce between ports and places within this state, or having their home port in this state, shall be subject to a lien thereon, which lien shall extend to the tackle, apparel and furniture of such craft as follows:

First—For all debts contracted by the owner or part owner, master, clerk, steward, agent or shiphusband of such craft, on account of supplies and provisions furnished for the use of such water craft, on account of work done or services

rendered on board of such craft by any seaman, master or other employee thereof, or on account of work done or materials furnished by mechanics, tradesmen or others, in or about the building, repairing, fitting, furnishing or equipping such craft.

Second—For all sums due for wharfage, anchorage or dock hire, including the use of dry docks.

Third—For sums due for towage, labor at pumping out or raising, when sunk or disabled, and to shiphusband or agent of such water craft, for disbursements due by the owner on account of such water craft.

Fourth—For all damages arising for the non-performance of any contract of affreightment, or of any contract touching the transportation of property entered into by the master, owner, agent or consignee of such water craft, where any such contract is made in this state.

Fifth—For all damages arising from injuries done to persons or property by [*163 such water craft, whether the same are aboard said vessel or not, where the same shall have occurred through the negligence or misconduct of the owner, agent, master or employee thereon; but said craft shall not be liable for any injury, or damage received by one of the crew from another member of the crew. [R. S. 1845, p. 71, § 1; L. 1857, p. 52, § 1; p. 105, § 1.

2. LIEN ON GOODS FOR FREIGHT.] § 2. There shall also be a lien upon the goods, wares and merchandise shipped, taken in and put aboard any such water craft for sums due for freight, advanced charges and demurrage, which shall be collected against said goods, wares and merchandise in the same manner as hereinafter provided in this act, in cases of sums due against said water craft.

3. LIMITATION.] § 3. Any such lien may be enforced in the manner herein provided at any time within five years: *Provided*, no creditor shall be allowed to enforce such lien as against, or to the prejudice of any other creditor or subsequent incumbrancer, or *bona fide* purchaser, unless proceedings be instituted to enforce such lien within nine months after the indebtedness accrues or becomes due. [R. S. 1845, p. 72, § 6; L. 1855, p. 149, § 1.

4. PETITION.] § 4. The person claiming to have a lien under the provisions of this act may file with the clerk of any court of record of competent jurisdiction, in the county where any such water craft may be found, a petition, setting forth the nature of his claim, the amount due after allowing all payments and just offsets, the name of the water craft, and the name and residence of each owner known to

the petitioner; and when any owner or his place of residence is not known to the petitioner, he shall so state, and that he has made inquiry and is unable to ascertain the same; which petition shall be verified by affidavit of the petitioner or his agent or attorney. If the claim is upon an account or instrument in writing, a copy of the same shall be attached to the petition. [R. S. 1845, p. 71, § 2; L. 1857, p. 105, § 3.

5. BOND.] § 5. The petitioner, or his agent or attorney, shall also file with such petition a bond, payable to the owner of the craft to be attached, or, if unknown, to the unknown owners thereof, in at least double the amount of the claim, with security to be approved by the clerk, conditioned that the petitioner shall prosecute his suit with effect, or, in case of failure therein, will pay all costs and damages which the owner or other person interested in such water craft may sustain, in consequence of the wrongful suing out of such attachment, which bond may be sued by any owner or person interested, in the same manner as if it had been given to such person by his proper name. Only such persons shall be required to join in such suit as have a joint interest; others may allege breaches and have assessment of damages, as in other cases of suits on penal bonds. [R. S. 1845, p. 71, § 2.

6. WRIT—NAMES OF DEFENDANTS.] § 6. Upon the filing of such petition and bond as aforesaid, the clerk shall issue a writ of attachment against the owners of such water craft, directed to the sheriff of this county, commanding him to attach such water craft, which writ shall be tested and returnable as other writs of attachments. Such owners may be designated by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known. If the name of any owner is unknown, he may be designated as unknown owner. [L. 1857, p. 105, § 4.

7. FORM OF WRIT.] § 7. The writ shall be substantially in the following form:

STATE OF ILLINOIS, } ss.
..... *County.* }

The People of the State of Illinois, to the Sheriff of ..... County—GREETING:

Whereas .....(name of the petitioner) hath complained that owners of the.....(name of the vessel) are justly indebted to him in the [sum of].....dollars (amount due,) for which he claims a lien upon said vessel, and has given bond with security as required by law: We therefore command you that you attach the said ..... (name of vessel,) her tackle, apparel and furniture, to satisfy such demand and costs, and all such demands as shall be exhibited against such vessel according to law, and having attached the same you summon.....(here insert the names of owners of such vessel) owners of

such vessel, to be and appear before the.....court of.....at its next term, to be holden at the court house in said county on the .. day of.....then and there to answer what may be objected against them and the said.....(name of vessel). And have you then and there this writ, with a return thereon in what manner you have executed the same.

Witness:.....Clerk of.....Court, and the seal thereof, this .....day of .....A. D. 18 ...

....., *Clerk.*

*164 **8.** EXECUTION OF WRIT—RETURN.] § 8. The sheriff or other officer to whom such writ shall be directed shall forthwith execute the same by reading the same to such defendants, and attaching the vessel, her tackle, apparel and furniture, and shall keep the same until disposed of as hereinafter provided. Such sheriff or other officer shall also, on or before the return day in such writ, or at any time after the service thereof, upon the request of the petitioner, make a return to said court, stating therein particularly his doings in the premises, and shall make, subscribe and annex thereto a just and true inventory of all the property so attached. [L. 1857, p. 105, § 4.

9. ONLY ONE ATTACHMENT.] § 9. Whenever any such writ shall be issued and served, no other attachment shall issue against the said water craft, unless the first attachment is discharged, or the vessel is bonded.

10. NOTICE BY PUBLICATION AND MAIL.] § 10. Upon return being made to such writ, unless the vessel has been bonded, as hereinafter provided, the clerk shall immediately cause notice to be given in the same manner as required in other cases of attachment. The notice shall contain, in addition to that required in other cases of attachment, a notice to all persons to intervene for their interests on a day certain, or that said claim will be heard *ex parte*. [See "Attachments," etc., ch. 11, § 22.

11. INTERVENING CREDITORS, ETC.] § 11. Any person having a lien upon or any interest in the water craft attached, may intervene to protect said interest, by filing a petition as hereinbefore provided, entitled an intervening petition; and any person interested may be made a defendant at the request of himself, or any party to the suit, and may defend any petition by filing an answer as hereinafter provided, and giving security satisfactory to the court, to pay any costs arising from such defense; and upon the filing of any intervening petition, a summons, as hereinbefore provided, shall issue; and if the same shall be returned not served, notice by publication may be given as aforesaid; and several intervening petitioners may be united with each other, or the original, in one notice.

12. BOND BY INTERVENOR.] § 12. Any person intervening to enforce any lien or claims adverse to the owners of the craft attached shall, at the time of filing his petition, file with the clerk a bond as in the case of the original attachment.

13. WHEN INTERVENING PETITION MAY BE FILED—PROCEEDINGS.] § 13. Intervening petitions may be filed at any time before the vessel is bonded, as provided in section fifteen [15]; or, if the same is not so bonded, before order for distribution of the proceeds of the sale of the craft. And the same proceeding shall thereupon be had as in the case of claims filed before sale.

14. LIENS NOT FILED TO CEASE.] § 14. All liens upon any water craft which shall not be filed hereunder before sale under decree or judgment, as hereinafter provided, shall cease.

15. BONDING VESSEL.] § 15. The owner, or his agent or attorney, or any other person interested in such water craft, desiring the return of the property attached, having first given notice to the petitioner, his agent or attorney, of his intention to bond the same, may, at any time before judgment, file with the clerk of the court in which the suit is pending, a bond to the parties, having previously filed petitions against such craft, in a penalty at least double the aggregate of all sums alleged to be due the several petitioners, with security to be approved by the clerk, conditioned that the obligors will pay all moneys adjudged to be due such claimants, with costs of suit. [R. S. 1845, p. 72, § 5; L. 1857, p. 105, § 5.

16. APPRAISEMENT—RESTITUTION—SALE.] § 16. If the owner or his agent or attorney, or other party in interest, so elect, in place of bonding, as aforesaid, he may apply to the court or judge thereof upon like notice as aforesaid, for an order of appraisement of such water craft so seized, by three competent persons to be appointed by the court or judge thereof and named in the order, and upon such party depositing with the clerk the amount of such appraisement in money, or executing or filing with him a bond for said amount, executed as provided in the preceding section, it shall be the duty of the clerk to issue an order of restitution, as provided in next section, and [*165 if the claimant of such water craft shall decline any such application, or neglect within twenty days to accept such appraisement and make the deposit, or give the bond as aforesaid, or the property seized shall be liable to decay, depreciation or injury from delay, the court, in its discretion, may order the same or part

thereof to be sold, and the proceeds thereof to be brought into court to abide the event of the suit.

17. ORDER OF RESTITUTION, ETC.] § 17. Upon receiving a bond or deposit, as provided in either of the foregoing sections, it shall be the duty of the clerk to issue an order of restitution, directing the officer who attached the water craft to deliver the same to the person from whose possession the same was taken, and said water craft shall thenceforth be discharged from all the liens secured by bond or deposit, unless the court or judge thereof, upon motion, shall order the same again into custody on account of the insufficiency or insolvency of the surety. [R. S. 1845, p. 72, § 5.

18. ADDITIONAL SECURITY.] § 18. If any petitioner shall, at any time, become satisfied that his security is insufficient, or has become imperiled, he may, by motion founded upon affidavit filed, and upon notice served with copy of such affidavit and motion, move the court to direct the giving of additional security, which motion shall be summarily heard and determined, and such order made therein as justice shall require; and the court shall have power to enforce all orders so made by attachment for contempt against persons, or writ against such water craft, or otherwise.

19. ANSWER—AFFIDAVIT OF MERITS—DEFAULT.] § 19. Within three days after return day of such summons—if personally served, ten days before the first day of the term to which it is returnable, or if not personally served, then within the time prescribed in the published notice—the owner or any person interested adversely to the claims mentioned in the notice, unless, on cause shown, further time shall be allowed by the court, shall except, demur or file his answer upon oath or affirmation. The answer shall be full and distinct to each allegation of the petition, but such answer shall not have the effect of a sworn answer in chancery as evidence. At the time of filing an exception, demurrer or answer, an affidavit of the claimant, or his agent or attorney, shall be filed, stating that the claimant has a good defense upon the merits. And in case no such exception, demurrer or answer, together with such affidavit of merits be filed within the time above specified, the petitioner shall be entitled to a default, and the demand may be proved and judgment rendered as in other cases. [L. 1857, p. 105, § 6.

20. AMENDMENTS—NEW PARTIES.] § 20. Amendments may be allowed as in other cases and upon like terms and conditions, and the court may take all proceedings and make all orders necessary to fully dispose of the rights of all

persons interested in the property attached, and for that purpose may add new parties whenever necessary, who may be summoned or notified as in case of original defendants.

21. JUDGMENT WHEN VESSEL DISCHARGED.] § 21. If, upon the trial, judgment shall pass for the petitioner, and the water craft has been discharged from custody as herein provided, said judgment or decree shall be rendered against the principal and sureties in the bond: *Provided*, that in no case shall the judgment exceed the penalty of the bond, and the subsequent proceedings shall be the same as now provided by law in personal actions in the courts of record in this state. If the release has been upon deposit, the judgment shall be paid out of said deposit.

22. JUDGMENT WHEN VESSEL IN CUSTODY.] § 22. In case the water craft has not been discharged from custody, the judgment or decree shall be that the same, with the appurtenances, be sold at public vendue by the sheriff, after notice of the time and place of said sale, published as herein required in cases of seizure, at least ten days before such sale: *Provided*, that in case of petition filed prior to distribution, the judgment shall be for payment out of the proceeds of sale, and in case of claims filed against *166] surplus proceeds, the judgment, if in favor of the petitioner, shall, in substance, affirm the claim to be sustained, and direct payment thereof from the surplus proceeds. [L. 1857, p. 105, § 6.

23. ORDER OF SALE.] § 23. The clerk shall thereupon issue an order of sale, commanding the sheriff to sell such water craft as directed in the judgment, and to return said writ within twenty-four hours after sale, with his doings in the premises, and with proof, by affidavit, of the requisite notice, with a copy of such notice. [R. S. 1845, p. 71, § 1.

24. PROCEEDINGS ON SALE.] § 24. It shall be the duty of the sheriff, upon receiving the amount of the bid at any sale, either before or after judgment, from the purchaser, or in case the purchaser is petitioner or an intervenor, upon receiving so much of the bid as the court or judge thereof shall direct by special order, reference being had to the relative amount of the buyer's claim, to deliver such water craft and appurtenances to the purchaser, with a bill of sale thereof, and to return and to deliver to the clerk the amount by him received on such sale.

25. BILL OF SALE—EVIDENCE—EFFECT.] § 25. A copy of the last enrollment, if any, of such water craft, shall be recited in the bill of sale if such copy can be obtained, and a copy of the judgment, with the order of sale, or if such craft is sold pursuant to an order before judgment, a copy of

such order shall also be recited in such bill of sale, certified by the clerk, under the seal of the court; and such bill of sale shall be full and complete evidence of the regularity of the judgment or order and sale, in all courts and places, and shall supercede the necessity of any other proof thereof to validate said bill of sale; and all bills of sale containing such recital, and supported by such proof, shall be effectual to pass the title of such water craft.

Before justices of the peace.

26. DISTRIBUTION.] § 26. The sum delivered by the sheriff to the clerk as aforesaid, shall be distributed by the court upon motion of any party in interest of record, and due notice to the other parties, and after the following manner:

First—The costs accruing upon all complaints filed before distribution, and on which judgment or decree is or may be thereafter rendered in favor of complainant.

Second—Seamen's (which term shall include the master) wages due upon the last two voyages, or if shipped by the month the last two months.

Third—All other claims filed prior to order of distribution on which decree or judgment may be rendered in favor of complainant, together with whatever balance may be due seamen.

27. REMNANTS.] § 27. Any portion of the sum so paid by the sheriff to the clerk, or of a deposit remaining after such distribution as aforesaid, shall be denominated remnants and surplus proceeds, and where any claim or complaint shall be filed against the same as provided in this act, distribution shall be directed by the court after decree or judgment upon motion and notice, as provided in the last section, and after the following order:

First—All costs upon claims passing into decree which were filed after distribution.

Second—All other liens enforceable under this act against the water craft prior to distribution.

Third—All claims upon mortgages of such water craft or other incumbrances by the owner, in proportion to the interest they cover and priority.

Fourth—Upon petition of the creditor, all judgments at law, or decrees in chancery against the owner, and which ought equitably to be paid out of the proceeds in preference to the owner.

Fifth—The owner.

28. POWER OF COURT IN DISTRIBUTION.] § 28. In case the sum for which the water craft is sold is sufficient to

pay all the claims filed before distribution, with costs thereon, and an appeal is taken as hereinafter provided, the court may order distribution of such portion of the sum brought on sale upon judgments unappealed from as may seem just and proper.

29. APPEAL—ERROR.] § 29. Any party complaining or defending, who may think himself aggrieved by the final judgment of the court, may appeal therefrom to the [*167 supreme court, or may prosecute a writ of error in the same manner as appeals or writs of error are taken or prosecuted in other cases. [L. 1857, p. 106, § 9; L. 1865, p. 104, § 1.

BEFORE JUSTICES OF THE PEACE.

SECTION
30. Proceedings before a Justice.
31. Complaint.
32. Bond.
33. Form of writ.
34. Sunday.
35. Service of writ of attachment.
36. Appearance—continuance.
37. Bonding vessel.
38. Execution.
39. Sale.
40. Saving.
41. Contract with boat.
42. Rafts.
43. Appearance.
44. Amendments.
45. Justice's jurisdiction.
46. Lien before justices—practice.

30. PROCEEDINGS BEFORE JUSTICE.] § 30. In an action brought before a justice of the peace against the owner of any boat to recover any debt contracted by such owner, or by the master, agent, clerk or consignee thereof, for supplies furnished or for labor done in, about or on such boat, or for materials furnished in building, repairing, fitting out, furnishing or equipping the same, or to recover for the non-performance of any contract relative to the transportation of persons or property thereon, made by any persons aforesaid, or to recover injuries to persons or property by such boat, or the officers or the crew thereof, done in connection with the business of such boat, an attachment may issue against such boat as hereinafter provided.

31. COMPLAINT.] § 31. Before the commencement of the action, the plaintiff, his agent or attorney, shall file with the justice an affidavit, which may be substantially in the following form:

STATE OF ILLINOIS, } ss.
..... *County.* }

A B, (or C D, his agent or attorney,) being duly sworn, says: That A B, the plaintiff, has a just demand against E F, the defendant, (if

known; if not known, against the boat, naming it,) on account of (here make a short statement of the nature of the demand, giving the amount due,) and the plaintiff prays an attachment therefor.

32. BOND.] § 32. The plaintiff, his agent, or attorney, shall file with the affidavit a bond, as provided by section five of this act, as near as may be, and suits may be brought on the bond and proceedings had thereon, as said section five provides.

33. FORM OF WRIT.] § 33. Upon the filing of such affidavit and bond, the justice shall issue a writ of attachment, substantially in the following form:

Before justices of the peace.

STATE OF ILLINOIS, } ss.
..... *County.* }

The People of the State of Illinois, to any Sheriff, Coroner, or Constable of said County—GREETING:

Whereas ....(name of plaintiff, agent or attorney) hath complained that owner of the ... ...(name of boat) is justly indebted to plaintiff in the sum of ... .. dollars (amount due,) and has given bond and security as provided by law: We therefore command you that you attach said ... .(name of boat,) her tackle, apparel and furniture, to satisfy such demand and costs, and having attached the same you summon ... ...(here insert the name of the owner of the boat, if known,) to be and appear before me at my office in.....in said..... county and state on the.... day of.....18.., at .. o'clock.... M., then and there to answer what may be objected against him and the said.... ...(name of boat). And have you then and there this writ, with a return thereon in what manner you have executed the same.

Given under my hand, this .....day of ... ...18 ...

....*J. P.*

34. SUNDAY.] § 34. The attachment may be issued on Sunday, if the plaintiff, his agent or attorney, shall state in the affidavit that it would be unsafe to delay proceedings until Monday.

35. SERVICE OF ATTACHMENT.] § 35. It shall be sufficient to serve the attachment on the defendant, or master, agent, clerk or consignee of the boat; and if none of them can be found in the county, it shall be sufficient to serve the writ by posting a copy thereof on the boat.

36. APPEARANCE—CONTINUANCE.] § 36. Any person interested in the boat may appear by himself, agent or attorney, and defend, and no continuance shall be granted to the plaintiff while the boat is held in custody.

37. BONDING VESSEL.] § 37. The property attached may be released at any time before final judgment by giving bonds with sureties, to be approved by the officer serving the writ, in a penalty double the plaintiff's demand, con-

ditioned that the obligors therein will pay the amount found due to the plaintiff, together with costs, or return the property attached on execution.

38. EXECUTION.] § 38. If judgment be rendered for the plaintiff before the property attached is released, a special execution shall be issued against it. If the property *168] has been released, the execution shall issue against the obligors in the bond without further proceeding. If the property be returned, it shall be first sold on the execution.

39. SALE.] § 39. The officer may sell any of the furniture, tackle or appendages of the boat, if by so doing he can satisfy the demand and costs. If he sell the boat he must sell it to the bidder who will advance the amount required to satisfy the execution for the lowest fractional share of the boat. If a fractional share of the boat be thus sold, the purchaser shall hold such share jointly with the other owner.

40. SAVING.] § 40. Nothing herein contained shall affect the right of the plaintiff to sue in the same manner as though the provisions of this act had not been enacted.

41. CONTRACT WITH BOAT.] § 41. In action before a justice of the peace, it shall be sufficient to allege the contract to have been made with the boat.

42. RAFTS.] § 42. Any raft found in the waters of this state shall be liable to attachment for all debts contracted by the owner, agent, clerk or pilot thereof, on account of work done, services rendered, or supplies furnished for such raft; and the action may be brought directly against the raft, and the same rules shall govern, and the same process shall be had in such action as are in this act prescribed for actions against boats before justices of the peace.

43. APPEARANCE.] § 43. The execution by or for the owner of such boat or raft, of a bond whereby the same is released to him, shall be an appearance of such owner as a defendant to the action.

44. AMENDMENTS.] § 44. Affidavits, bonds and writs, in cases before justices of the peace in this act mentioned, may be amended, as provided in cases of original attachment, and appeals allowed to a court of record, as in other civil actions before justices of the peace.

45. JUSTICE'S JURISDICTION.] § 45. In all cases of attachment before a justice of the peace under this act, the justice shall have jurisdiction in any sum not exceeding $200.

46. LIEN BEFORE JUSTICES—PRACTICE.] § 46. No lien shall be allowed under this act in proceedings before justices until the levy of the writ of attachment, and then only as against owners, subsequent purchasers and creditors; and, except as herein provided, the practice and the proceedings shall be the same as in other civil actions in justices' courts.

ARGUMENT.

In the maze of discussion which has been indulged before, and by this Court, upon the extent of the constitutional grant of judicial power involved in the phrase, "To all cases of Admiralty and maritime jurisdiction," one may well hesitate to take a step.

In fact, it would seem sufficient to state our propositions and submit them to the Court.

One thing is noticeable, viz., that each succeeding examination by this Court seems to have resulted in restoring that jurisdiction to meet the necessities of commerce, the growth of a new country, and has aided in building into symmetry and strength a valuable part of the National jurisprudence.

Objections to the jurisdiction of the Admiralty Courts, because the waters floating the ship failed to answer the beckonings of the moon, or taste of the salt sea, or ran between banks, or were inland waters, or that her contracts were signed in warehouses instead of cabins, sealed or unsealed, all have slowly but steadily yielded to the needs of the new Nation of the earth, whose Courts have hesitated not to take its Admiralty law from the best known authorities, ancient or modern.

Without present discussion, whether or not either the vessel or the tug would in Admiralty, without regard to the State law, be subject to be libelled for the alleged trespass in running into an elevator built over the water, so as to interfere with the bowsprit of the vessel while sailing navigable waters, we submit that the Attachment Act in question, having created *a lien* upon a vessel, exclusive jurisdiction to enforce

it by a proceeding *in rem* was in the District Courts. That the cause is not determined by the question whether or not the trespass complained of would, in Admiralty, have been a maritime lien, but by the question whether or not it is a proceeding *in rem* against a vessel *by name*, according to Admiralty forms—a usurping of Admiralty jurisdiction and procedure. This trespass, being made a lien upon a vessel by a State law, that claim should be joined in the same list with other State-made maritime liens, and its enforcement must be relegated to the District Courts.

Supplies furnished in a home port were not maritime liens. This same chapter 12 makes them liens by State law.

Services of a master were not a maritime lien. The State law made them a lien and the United States Courts enforce them.

"The State law having given the right, the District "Court, as a Court of Admiralty, has jurisdiction of a suit to "enforce such right."

Holmes vs. *O. & C. Railway Company.*
5 Federal Rep., 80.

"Damages given by a State Statute for a marine tort "may be recovered in the proper District Court in Admiralty."

The Clatsop Chief, 13 Legal News, 407.

7 Sayre 274

THE ACT IN QUESTION ADOPTS ADMIRALTY PRACTICE AND PROCEDURE, AND IS A PROCEEDING *in rem* AGAINST A VESSEL BEYOND THE POWER OF A STATE LEGISLATURE TO ENACT.

The "Petition" to be made under sec. 4 is a libel.

The Bond under sec. 5 is the Admiralty stipulation for costs.

The Writ, secs. 6 and 7, is a warrant of arrest in so many words, commanding the arrest of the vessel.

The Notice, sec. 10, by publication, "To all persons to "intervene for their interest," is the Admiralty monition.

The judgment, sec. 22, is that the vessel and appurtenances be sold—the WHOLE VESSEL is sold, not the interest of any defendant named.

The Bill of Sale, sec. 25, is required to contain a "*copy of* "*the enrollment*," and such bills of sale "shall be effectual to pass THE TITLE of such water craft."

The Distribution, sec. 26, is like Admiralty: 1st, costs; 2d. "Seaman's wages the last two voyages, or last two months." This is unique, and a new method of the recognition of the prior lien of sailor's wages—with a limitation.

It would have been a simpler chapter to have enacted what acts or omissions should be liens on water craft, and then enacted: "The practice and procedure of the Admi- "ralty Courts of the United States shall be adopted by the "Circuit Courts of Illinois in enforcing the liens hereby "created."

Is the inter-State and foreign commerce of the Lakes to be hampered by such a petty Admiralty branch in Illinois? Shall that preference be given to her ports over others of the Union? May Illinois burden commerce with an action *in rem* for alleged damages by and supplies to a vessel, and pass title thereto? It will be attempted to be shown that this procedure is only an attachment suit against Johnson.

Counsel for the petitioner claim that this is an action against Johnson, and not against the tug "Parker." Can petitioner make it a personal action only, by naming a defendant, and he but a *part* owner, which they need not have

done. The *act* provides for the enforcing of the *lien* against the *craft*, whether owners were ever found or not. The act creates the lien *in rem* and the method of enforcing it.

The petition prayed for a decree subjecting the tug to a *lien*.

The bond recites: "Whereas, they have prayed an attachment against the tug-boat 'Parker.'" Transcript, page 5.

The attachment writ recites: Whereas, etc., they claim a *lien* for at least $393.68 upon said *vessel*, etc. "We therefore "command that you attach the said tug-boat Parker, her "tackle, apparel and furniture, to satisfy such demand, and "*all such demands as shall be exhibited against such vessel.*" Page 5, transcript.

The bond for release recites that: "Whereas, the Com- "pany have filed a petition *against* the tug 'Parker,' her "tackel, apparel and furniture." Page 6, transcript.

The writ of restitution reads: "Whereas, you were lately "commanded by our Circuit Court of Cook County to attach "the tug-boat Parker, her tackle, apparel and furniture."

The counsel did name a defendant, in the hope of avoiding the late decisions in regard to State liens on craft engaged in domestic commerce, but the act required only the name of the water craft, and the names and residences of the owners, *if known*. It is not an essential requisite of the act, that a defendant be named, other than as an unknown owner.

The act purports to be able to pass the title to the vessel through a sheriff's deed, by simply proceeding *in rem*. The whole tenor, drift and intention of the act was to create and enforce a *lien in rem* on the craft by *its name*, irrespective of its ownership, and by admiralty forms of procedure.

This is the construction which the Supreme Court of Illinois places on these acts:

"With variation in detail, the object of the statutes of "all the States is identical, and that is to give a summary "remedy against boats and water craft employed upon such "waters, the *owners of which* are not generally known, or "within the reach of personal service of process."

Williamson vs. *Hogan*, 46 Ill., 511.

"The object of the statutes being to give a *summary* rem- "edy *against vessels* employed in domestic navigation on the "navigable waters of the State."

Schooner Norway vs. *Jensen*, 52 Ill., 381.

Of a similar law this Court said:

"The action against the steamer *by name*, authorized by "the statute of California, is a proceeding in the nature and "with the incidents of a suit in Admiralty. * * * It is "this dominion of the suit in Admiralty over the vessel; a "thing itself which gives to the title made under its process "validity against all the world. * * * It is not a remedy in "the common law Courts which is secured, it is a 'common "'law remedy;' a procedure *in rem* as used in the Admiralty "Court is not a remedy afforded by the common law. It is "a 'proceeding under the civil law;' where used in the com- "mon law Courts it is given by statute."

The Moses Taylor, 4 Wall., 411.

How completely it applies to *every* vessel, foreign or otherwise, as construed by the Courts of Illinois, may be seen in *City of Chicago* vs. *Schooner Queen City*, where the Court says:

"The language of these several Acts is broad and com- "prehensive, embracing *every* and *all* vessels actually used "in navigating the waters or canals of the State, and indi-

"cate clearly the intention of the Legislature to furnish a "convenient remedy for violations of the statute in the State "Courts."

City of Chicago vs. *Schooner Queen City*, 17 Brad. Ap. Ct. Rep., 205, 1886.

This act is strictly an admiralty proceeding, and differs largely from the act existing before the revision of 1874, under which *former* act the Supreme Court of Illinois had rendered the decisions which counsel for petitioner will quote. Since the adoption of the present act a decision of the Supreme Court of the United States has been given, which, it is generally conceded, settles the question of enforcing in State Courts, State liens and actions *in rem* against water craft, whether defendants are named or not:

"State laws cannot alter the limits of admiralty jurisdic- "tion, nor can they confer it upon the State Courts, so as to "enable them to proceed *in rem* for the enforcement of liens "created by such State laws, for it is *exclusively* conferred "upon the District Courts of the United States. * * * "The practice may be somewhat anomalous, but it has ex- "isted from the beginning of the Government, and perhaps "was originally superinduced by the fact that prior to the "adoption of the Constitution, liens of this sort created by "the State law had been enforced by the State Courts of "Admiralty."

The Lottawana, 21 Wal., 558.

Of the attempt to call this character of action a common law action, in reference to the Iowa Statute, which was similar, the Court in *Hine* vs. *Trevor*, 4 Wall., 511, says: "It is a "remedy, partaking of the essential features of an admiralty "proceeding *in rem*. The statutes provide that the vessel "may be sued and made the defendant without mentioning "their names. That a writ may be issued and the vessel seized, "on filing a petition similar in substance to a libel, that the

"vessel may be condemned and ordered sold. * * * Such "is the general character of the steamboat laws of the West- "ern States. And it also differs from an attachment. There "the suit is against the defendant by name, and because of "inability to serve process on him by reason of non-residence, "or other reason mentioned in the statute. The suit is com- "menced, directing the officer to attach *sufficient* property "of the defendant to answer any judgment which may be "entered against him. This proceeding may be had against an "owner or part owner, and his interest in the vessel subjected "to sale in a Common Law Court of the State."

"It could not have been the intention of Congress, by "the exception in that section, to give the suitor all such "remedies as might be enacted by State Statutes, for this "would have enabled the States to make the jurisdiction of "their Courts concurrent in all cases, by providing a remedy "for all cases. Thus the jurisdiction of the Federal Courts "would be defeated."

Hine vs. *Trevor*, 4 Wall., ~~554~~ 555

Is this not true of the statute in question? The whole vessel is seized, the whole vessel is sold, and it makes no difference who the owners are, or whether they were guilty in any way of contributing to the marine tort, further than that they owned the offending craft.

"State Statutes which attempt to confer upon State "Courts a remedy for marine torts and marine contracts by proceedings strictly *in rem*, are void."

"In all cases where a maritime lien arises, the original "jurisdiction *to enforce* the same by a proceeding *in rem*, is "exclusive in the District Courts of the United States, as "provided by the 9th section of the Judiciary Act of 1789."

The Belfast, 7 Wallace, 624.

"Ships or vessels of the United States are the creation of "the legislation of Congress. Must be owned by citizens of "the United States, and registered and enrolled, to be enti- "tled to protection or benefit. Their substantial, if not "entire value, consists in their right to the character of Na- "tional vessels, and to have the protection of the National "flag floating at their mast head.

"Congress having created this species of property as it "were, may secure and protect the rights and *titles* of all per- "sons dealing therein."

White's Bank vs. *Smith*, 7 Wallace, 656.

"That a proceeding *in rem* as used in the Admiralty "Courts is not a common law remedy. There can be no "doubt that all State legislation providing for the *enforcement* "of a maritime claim or contract in any other manner than "by a common law remedy, infringes on the exclusive juris- "diction of the Federal Courts, and violates the Constitution "of the United States."

The Surplus and Remnants of the ship Edith, 5 Benedict, 439.

"If a State shall institute a proceeding *in rem* unknown "to the common law, it would be a violation of the Consti- "tution and laws of the Union."

The N. W. Thomas, 1 Biss., 219.

A clear decision on this vexed question is that rendered in 1876 by Chief Justice Ryan, and from the logic of which there seems to us to be no escape, and to apply directly to the statute in question:

"It is too late, while the Supreme Court of the United "States abides by its present rule of decision, to question the "authority of the State law to give certain maritime liens on "domestic ships in home ports.

"It is also too late to doubt the *exclusive* jurisdiction of "Federal Courts to *enforce* such liens *in rem.*

"The statute applies to liabilities incurred by the master, "owner or agent or consignee of a vessel, and authorizes an "attachment against the person incurring the liability, and "vessel by name, whether the defendant be master, owner, "agent or assignee—appears to be a mixed proceeding *in per-* "*sonam* against the master, owner or agent and *in rem* against "the vessel. The liability of the vessel is determined against "itself, whatever may be the personal relation of the de- "fendant.

"So far as it relates to the vessel, we take this to be "strictly a proceeding *in rem, none the less so because it is joined* "*with a proceeding in personam* against the person.

"This appears to be the whole object and scope of the "Statute, which is to create and enforce maritime liens on "vessels for debts due upon maritime contracts. Such a "proceeding must necessarily be *in rem*, aud the jurisdiction "to entertain it is essentially a jurisdiction in admiralty.

"The proceeding authorized by the Statute appears to "us to be very plainly within the rule of the Supreme Court "of the United States in *The Moses Taylor* and *Hine* vs. *Trevor*, "4 Wall., 555.

"And in submission to the decisions of the Supreme Court "of the United States, and, following *Campbell* vs. *Sherman* in "this Court, we feel compelled to hold that the Statute in "question can confer no jurisdiction on the Courts of this "State, to entertain the proceeding which it authorizes."

Weston vs. *Morse*, 40 Wis., 459.

The above decision disposed of Chapter 144, Rev. Statutes of Wisconsin, "Liens against Ships, Boats and Vessels,"

an Act much stronger as an Attachment Act *in personam* than the present laws of the State of Illinois.

These decisions are in accord with the line of decisions of the United States Courts, and afford the only proper method of disposing of the vexed question of Liens on vessels, which may be created by one craft in the various ports of the different States, where she may commit maritime torts or create maritime contracts, by relegating to the United States Courts the sole power to enforce all liens on water craft engaged in domestic commerce by proceedings *in rem.*

The assertion of counsel that it is not an action *in rem* will not change it, as the Court said under a similar law in New York State:

"The characteristic proceedings under this Statute is, "that the *vessel is seized* and *impleaded as defendant*, and is "adjudged and sentenced accordingly; which is just the pro- "ceeding in a Court of Admiralty in proceeding *in rem.* It "is in the nature of and has all the incidents of a suit in "Admiralty, and exclusive jurisdiction has been conferred "on the District Courts of the United States. As it excludes "all jurisdiction from State Courts, it follows that these pro- "ceedings *in rem*, under the Statutes of the State, cannot be "sustained."

In re Steamboat Josephine, 39 N. Y., 27.

The Supreme Court of Illinois admit it trenches close to the border of interference, but *hesitatingly*, for the first time in thirty years, and say:

"The proceedings under the 'Water Craft Act,' however, "is essentially, in many of its features, like a proceeding *in rem* "in Admiralty, though differing from the latter sufficiently, "it is believed, to avoid any conflict with the Constitution of

"the United States, which gives to the Federal Courts ex-
"clusive jurisdiction in Admiralty."

Langdon vs. *Wilcox*, 107 Ill., 612.

That the proceeding *against the ship itself* was always recognized as belonging to the jurisdiction of Admiralty, is shown by the agreement at Whitehall in 1632 between the King and all the lords of his council, when the "pro-
"hibition" battle was being settled between "His Majesty's
"Court of Westminister" and "His Court of Admiralty." Section 3 of the Agreement provided:

"If suit shall be in the Court of Admiralty for building,
"amending, saving, or necessary victualing of a ship, *against*
"*the ship itself*, and not against any party by name, but such
"as for his interest makes himself a party, no prohibition is
"to be granted, though this be done within the realm."

Benedict's Adm., sec. ~~25~~ 95

The most of the States on the Great Lakes, through their judiciary, have conceded to the Districts Courts *exclusive jurisdiction* to ENFORCE *liens in rem* against vessels floating the Flag, and subject to the rules and regulations prescribed by the Government over commerce thereon, and Illinois ought to be in the line.

The only obstacles to a uniform law are the few remaining almost obsolete State "Attachment of Water Craft" and "Liens on Vessels and Boats" Acts, which, in attempting to enforce *liens in rem* on vessels, embarass owners, raise conflicts in Courts with that great body of the law known as the Admiralty law, render uncertain the titles to vessels, and discourage that commerce on the lakes and high seas which has been the pride of the Government to encourage and control.

We respectfully submit the Court below ought have dis-

missed the petition for want of jurisdiction, upon the motion made.

THE CREATION OF A NEW MARITIME LIEN AND LAW FOR ITS ENFORCEMENT *in rem*, IS A REGULATION OF COMMERCE GIVING PREFERENCE TO THE PORTS OF ILLINOIS, AND AN ASSUMPTION OF ADMIRALTY JURISDICTION, IN VIOLATION OF THE CONSTITUTION.

We have already urged that the proceeding *in rem* alone was a violation of the exclusive jurisdiction of the United States Courts. To this it will be replied that Admiralty had no jurisdiction—it was not a maritime tort.

It will be urged that the damage was on the land and no maritime lien existed, and *The Plymouth* case, 3 Wall., 20, will be cited. That case belongs to the old series of narrow construction. The *locality* where made, formerly determined in some courts, in marine contracts (the jurisdiction); but a wider view of its jurisdiction soon eliminated that limitation, and the "subject matter" settled whether or not it was a marine contract. That a vessel should be held liable in an Admiralty Court for every injury, the result of careless seamanship, would seem reasonable, and more in accord with its general jurisdiction; That the *subject matter* of the alleged tort should govern, and not its locality; That if the controversy related to ships and shipping, masters and mariners, then Admiralty would have cognizance. The justice and propriety of this view is illustrated in the fact that in England the laws are extending, or rather restoring the jurisdiction of Admiralty by the imperial statutes passed in the years 1840 and 1861, 3 and 4 Vict. C. 65, and 24 and 25 Vict. C. 10. The 7th section enacts that the Court "shall have jurisdiction over "ANY claims for damage done *by any ship*," and in regard to which Dr. Lushington said: "I take it to mean any case of

"damage done by a ship. There is no limitation—no re-
"striction expressed."

The only questions hould be, whether the transaction relates to ships and vessels, masters and mariners, as agents of commerce on navigable waters. The jurisdiction can depend upon nothing but the subject matter and the character of the controversy.

Had the vessel suffered injury from the elevator, being built in navigable waters, under the Atlee Packet cases, 21 Wall., 389, her owners might maintain an action in *personam* in Admiralty against the owners of the elevator. Why not the owners of the elevator have redress in the same Court for an unlawful collision by a ship with their property, if lawfully located? No good reason can be shown why, as a collision by a ship, it should not be the subject of Admiralty jurisdiction, since the saline—the tidal—the sealed—the locality—rules on marine contracts, which once influenced the Court, no longer govern.

The laws of Oleron, as classified by Zouch, gave Admiralty jurisdiction "touching damages done *by* or betwixt "ships."

Benedicts Adm., sec. 52.

The extent of the early colonial jurisdiction is shown by the commissions of the Judges. The commission, dated Oct. 15, 1762, to Richard Morris, as Vice-Admiralty Judge, reads:

"George the Third, by the Grace of God, of Great
"Britain, France and Ireland, King, Defender of the Faith,
"To our beloved Richard Morris, Esquire, Greeting: We do
"by these presents make, ordain, nominate and appoint you,
"the said Richard Morris, to be our commissary in our prov-
"inces and colonies of New York, Connecticut and East and
"West Jerseys, in America, and territories thereto belonging,
"in the room of the former Judge, deceased; hereby grant-

"ing unto you full powers to take cognizance of and pro-
"ceed in *all causes civil and maritime*, and in complaints * *
"and all matters which do any way concern suits, trespasses,
"*injuries*, extortions, demands and affairs civil and maritime
"whatsoever, between owners of ships and merchants, or
"other persons whomsoever had made, began or contracted
"for " * * any matter, cause or thing, business, or *injury*
"*whatsoever* done, or to be done, as well, in, upon, or *by the*
"*sea*, or public streams, or fresh waters, ports, rivers, creeks
"and places overflowed whatsoever within the ebbing and
"flowing of the sea, or high water mark, as upon any of the
"shores or *banks* adjoining to them, or either of them, together
"with all and singular their incidents, emergencies, depend-
"encies, annexed and connexed causes whatsoever." * *

Benedict's Adm., sec. 151.

The commission of the Admiral of England by the ancient and later patents, granted jurisdiction "and also "of any cause, business, or *injury whatsoever*, had or done, or "upon, or *through*, the seas or public rivers, fresh waters, "streams and havens and places subject to overflowing "whatsoever, within the ebbing and flowing of the sea, *upon* "*the shores or banks* whatsoever adjoining to them or either of "them, from any of the said first bridges toward the sea."

Zouch, Ass. 2.

It is believed that an examination of the earlier cases will determine that Admirality did exercise jurisdiction over all damages by ships, even on shore.

In the case of *The Uhla*, where a breakwater was damaged by a ship, it was held that Admiralty had jurisdiction, and a libel would lie against the ship.

The Uhla, vol. XIX, Law Times Rep., N. S. 90.

The Beta, XX L. T. Rep., N. S., 988.

The Chase, 2 Stuart Vice Adm. Rep., 361.

The case of *The M. Moxam*, 34 L. T. Rep., N. S., 459, 1 Prob., Div. 43, was a cause of damage instituted against a steamship and her freight for £2,500, for collision with a pier of the plaintiffs, in Spain. The owners of the ship alleged that the pier formed part of the land of Spain, and that by the laws of the place the ship was not liable. The Court, however, sustained its jurisdiction, saying:

"The damage of which complaint is made, must be "be taken to have been inflicted by a British merchant ship, "while in water, is subject to the Admiralty jurisdiction "*within* the ebb and flow of the tide upon a pier within the "territory of Spain. The act of injury was done from the "merchant vessel at sea, though the object injured was situ- "ated on the land."

In a case tried in 1881 in the Vice Admiralty Court of New Brunswick, where the hawser of a vessel by which she was attached to the wharf overturned a passenger car standing upon a wharf, and a libel was filed, and it was objected that the injury was on land, the Court overruled the objection and entertained jurisdiction of the cause.

The Teddington, 14 Legal News, 140.

Suppose the damage had been mutual, is it possible that the vessel could have brought suit in Admiralty, and the owners of the elevator could not? Are not the rights to the benefits and advantages of that Court mutual.

That there are but few cases of collision on land in the books is due to the fact that in but few harbors could vessels do any damage on land. They were anchored in deep waters, and, *ex-necessitate*, few occurrences of that character would naturally occur "beneath the first bridges." Elevators did not line rivers—sea walls were not attacked by the prows of vessels in olden time.

All the acts of the Chas. W. Parker were on the waters; she did nothing on land; in fact, the lien of the law only applied to the G. C. Trumpf, and not the Chas. W. Parker. Sub. 5 of sec. 1 of the Act gave the lien "For all damages "arising from injuries to property *by such* water craft." The G. C. Trumpf did the damage, and by the letter of the law was alone subject to the lien. Statutes in derogation of the common law are to be strictly construed.

We submit that it was a maritime collision, done by a vessel on the water, by the fault of a sailor at the wheel, upon an elevator in the Lake service, while both were employed in the marine business, and ought to be a subject of maritime jurisdiction under Admiralty rule XV, "In all suits for damage by *collision.*"

The State Courts treat it as a maritime lien by creating a proceeding *in rem* against it, and the language of the Court in the Rock Island Bridge case, 6 Wall., 213, show they exist together:

"The only object of a proceeding *in rem* is to make this "right in the thing when it exists available to carry it into "effect. It subserves no other purpose. The *lien* and the "proceeding *in rem* are correlative; when one exists the "other can be taken, and not otherwise," and quoting the Privy Council, "Whilst it must be admitted that when such "lien exists a proceeding *in rem* may be had, it will be found "to be equally true that *in all cases* when a proceeding *in* "*rem* is the proper course, *then* a maritime lien exists which "gives a privileged claim upon the thing to be carried into "effect by legal process."

Rock Island Bridge, 6 Wall., 213.

"It is clear that if it is a proceeding *in rem*, then it is to "be *at least treated as a maritime lien*, and its enforcement "must be confided to the United States District Courts as

"being a part of the Admiralty jurisdiction of the Court, viz., "*enforcing* liens *in rem* against vessels.

Leon vs. *Galceran*, 11 Wall., 185.

"When the State appropriates the remedy *in rem*, it "comes within direct conflict with the 2d section, 8th article "of the Constitution of the United States. The State cannot "divest a lien existing in Admiralty.

The John Richards, 1 Newberry, 73.

Ashbrook vs. *the Golden Gate*, Newb., 297.

That this proposition, announced in *Hine* vs. *Trevor*, the *Moses Taylor*, and others, is adhered to, is shown in the case of the *Edith*, where the Court say:

"It matters not that the *statutory provisions for* ENFORCING "*the lien have been adjudged invalid, because beyond the power of* "*the State Legislature;* if they are invalid it may be doubted "whether all the provisions purporting to give a lien are not "also invalid, because inseparable from the means of enforcing "it, but without deciding that, we may remark," etc.

The Edith, 94 U. S., 523.

The Court touched the key note of the trouble when it said it was doubtful if the law giving the lien was valid when it could not be enforced *in rem* in the State Court. Such a *lien*, which it is claimed Admiralty could not enforce upon a ship, certainly ought not to be permitted to a State to create.

Chief Justice Ryan, of Wisconsin, saw the same trouble, when he says:

"How the exclusive jurisdiction of the Federal Courts "to administer is reconcilable with the authority of State "law to create maritime liens, is a question which State "Courts have no concern, and which seems to trouble the

"Federal Courts not a little. It is enough for us that their "jurisdiction over the subject is exclusive."

Weston vs. *Morse*, 40 Wis., 460.

It would be interesting to know by what authority Illinois can legislate that, if a foreign vessel (and it is to be remembered that the Illinois Courts holds the law applies to *all* vessels) enters the port of Chicago and strikes a wharf, warehouse, pier, or bridge, that by that act a lien enforceable *in rem* against her, without regard to ownership, has arisen, and she may be sold, other maritime liens cut off, and her title passed as against the world. Is it true of the ports of Michigan, Ohio and New York? Do like privileges to property owners govern in the ports of Detroit, Cleveland and Buffalo? It would seem to amount to a regulation of commerce inhibited by the Constitution.

The attempt to create a new maritime lien, and under it to seize and sell vessels which are unfortunate enough to commit an injury in the State ports, and thereby cut off all other established maritime liens, save "sailor's wages *two* months old," amounts to a regulation of commerce and an usurpation of Admiralty jurisdiction. The result would be as described by Judge Wells:

"Each Justice of the Peace having jurisdiction, we "should then have in these United States thirty-one thousand "Courts of Admiralty and maritime jurisdiction, to say noth- "of the Courts of Record. These Courts, proceeding against "and seizing and selling vessels of foreign nations and those "of sister States, each State having a different system—the "effect of this must be to embroil the United States with "foreign nations, and the several States with each other, and "to produce retaliatory laws, proceedings, and endless con- "flict, uncertainty and mischief.

"If I am right in the views above expressed, there can

"be no concurrent jurisdiction *in rem* in Admiralty cases be-
"tween the United States Courts and the Courts of the Uni-
"ted States."

Ashbrook vs. *the Golden Gate*, 1 Newberry Ad. Rep., 306.

What has been, in fact, the effect: numerous suits and contentions between Sheriffs and Marshals, State Courts and District Courts; bills of sale from Sheriffs, bills of sale from Marshals; contests in Missouri, Michigan, Illinois, Ohio, New York, Louisiana over the titles to ships, brought about by sales under these State Admiralty proceedings *in rem*, ignoring owners and creditors, having unquestioned maritime liens. The duty of the United States Courts to protect the *titles* to its ships, which carry United States licenses, pay United States dues, float the United States flag, and are subject to United States rules and regulations without number, and also to the summary and exacting process of its Admiralty Courts, is imperative--they ought not to be burdened by liability to like process in every State Court.

"In the application of the Limited Liability Act, no dis-
"tinction is made because the damages committed by the
"vessel are *on land*—but the vessel is given the benefit of the
"law, because it is recognized as a maritime tort she has
"committed."

In re Goodrich Transportation Co., 27 Fed. Rep., 715.

The following are well considered State cases, yielding jurisdiction to the United States Courts:

Steamer Petrel vs. *Dumont*, 28 Ohio St., 603.

Dowell vs. *Bowman*, 25 Ohio St., 391.

Walters vs. *Steamboat Mollie Dozier*, 24 Iowa, 193.

Crawford vs. *Bark Caroline Reed*, 42 Cal., 469.

Dera vs. *Steamboat Hope*, 42 Miss., 715.
The Steamboat Josephine, 39 N. Y., 19.
Weston vs. *Morse*, 40 Wis., 459.

THE ACT IS INVALID, BECAUSE WHILE PROCEEDING AGAINST THE *res* UNDER THE CONSTRUCTION GIVEN IT BY THE SUPREME COURT OF ILLINOIS, IT DENIES THE RIGHT OF A PART OWNER TO INTERPLEAD AND DEFEND.

The Act itself gave the right. The same Supreme Court at an earlier date had said:

"It is a right of which a party cannot be deprived. "Under such circumstances, where a proceeding is *in rem*, "any one who may by affidavit show a title to the *res*, should "be permitted to defend and protect his title."

Propeller Hilton vs. *Miller*, 62 Ill., 231.

Carter did make the affidavit, did offer the bond, but the Court under its construction of part of the 15th section of the Act, which is: "Intervening petitions may be filed at "any time *before* the vessel is bonded," decided that Carter had no right to interplead and defend, and the decision of the State Court is final on the construction of its own statutes. The Court argues (page 52 of the Transcript) that because the boat had been bonded, Carter had no interest—that his boat was discharged from the lien, and "that "there is no right of contribution between wrongdoers."

The Court ignored the fact that the same mongrel statute provided (see section 17) that upon the giving of the bond the boat shall be discharged from the liens, "UNLESS the Court "or Judge thereof, *upon motion*, shall order the *same again* "*into custody*, on account of the insufficiency or insolvency of "the surety."

Section 18 also said if at any time the petitioner shall become satisfied his security is insufficient, on motion, * * "The Court shall have power to enforce all orders so made "by attachment for contempt against persons or *writ against "such water craft*, or otherwise." The same Supreme Court had held that "The giving of the bond *did not discharge* the "lien. That notwithstanding the bond, she was subject to "be arrested for the same charge."

Tugboat E. P. Dorr vs. *Waldron*, 62 Ill., 222.

If that is true, then most assuredly Carter *did* have an interest in the suit, notwithstanding the giving of the bond by Johnson. Suppose the surety insolvent, the Court could at once arrest the boat to pay the judgment—a judgment, too, which Carter had not been allowed to contest, for an action, for which Carter more than any one, was directly responsible, because he was master of the offending craft at the time.

A boat commits an injury, and is arrested. A resident owner bonds her at once, to save loss, and because he has done this, and the boat is found guilty, the Supreme Court of Illinois says the other owner, who committed the act, is not liable—that the owner bonding cannot make the other contribute even to help pay the damages he carelessly created. "But the principle is, there is no right of contribu- "tion between wrongdoers." Such answer makes the Court to support the denial of the right of Carter to interplead, prayed *before* an order had been made in the case. It must be Illinois law, for the Court so announces it; and if so, we insist that it is unconstitutional in depriving Carter of his property without due process of law.

"It is a rule founded on natural justice that a party "shall have an opportunity to be he heard in his defense "before his property is condemned. If a person have not "such opportunity, and yet is deprived of his rights, the

"proceedings are not judicial, but arbitrary, and ought "not to have intrinsic credit given to them, either for their "justice or their truth."

Bradstreet vs. *Neptune Ins. Co.*, 3 Sumn., 607.

THE JUDGMENT AGAINST CHRISTY, WITHOUT APPEARANCE OR PROCESS OF LAW, WAS VOID.

In the attempt to appropriate Admiralty procedure, it became necessary to enact something by which judgment might be rendered against a surety on the bond given to release the vessel in the manner in which executions were allowed against the sureties in a stipulation, and thus section 21 was engrafted into the Act. This provision was not in the original law of 1845.

No such provision exists in Illinois in reference to any other attachment bonds. It provides: "If upon the trial, "*judgment* shall pass for the petitioner, * * * said judg- "ment shall be rendered against the principal and sureties "on the bond. Provided *that in no case* shall the judgment "*exceed the penalty* of the bond."

This Court can hardly fail to notice the extreme care and protection exercised by the Legislature over the surety by inserting the proviso that *never* should the judgment *exceed* the bond. It is only equalled by their tender guardianship of the vessel itself shown in sub. 1 of section 1, where they enact: "But said craft shall not be liable for any injury "or damage by one of the crew from another of the crew."

Christy's bond was a contract, and if made in view of the law, he was entitled to the letter of it; "if upon the "trial *judgment* shall pass to the petitioner." There was no judgment for the petitioner, in default of payment of which

judgment might be rendered against both on the bond, but the judgment was a joint judgment in the first instance.

The condition of the obligation was: "If Johnson shall "and will pay all money adjudged to be due said Chicago & "Pacific Elevator Company." There had first to be a "judg- "ment," an adjudication, before Christy became liable to have a judgment entered against him on the bond.

Again, the statute provided: "If upon the *trial*." In the present cause there was no trial—the only party summoned was *defaulted* for want of an affidavit of merits. There was only an assessment of damages.

Bouvier defines "trial," the "examination before a com- "petent tribunal, according to the laws of the land, of *the* "*facts put in issue* in a cause, for the purpose of defending "such issue."

No pleas were filed—no issues were joined in the cause —no *trial* was had.

In the case of *Beall* vs. *New Mexico*, 16 Wall., ~~100~~ 535, the suit itself was on a bond trial had, and upon the appeal affirmed, and then judgment rendered on the appeal bond against principal and sureties.

The requirement of a bond upon which *summary judgment* could be rendered against principal and surety, because it was a *vessel* which was attached, is only another evidence of an attempt to regulate the commerce of the port. No such provision is made in ordinary attachment proceedings, but because it is a *ship* attached and bonded, it is enacted that judgments may be rendered against the sureties.

If pianos or warehouses are attached and released upon a bond, the sureties may be heard before judgment, but if it is a vessel the proceedings are imperative. To our objection

that such practice and proceedings violate section 20 of the Constitution of Illinois prohibiting "*special* proceedings and practice," its Supreme Court answers it applies to all bonds of "that class," *i. e.* when *vessel* property, as distinguished from all other personal or real property, is attached, then delivery bonds shall be subject to *judgment instanter*; when *vessel* property is attached, and defense made, *then* an affidavit of merits *must* be filed *with* a demurrer, and no amendments allowed—a proceeding and practice unknown in the State, in reference to the defense of any other kind of property. Illinois Courts shelter themselves from the charge that such action on bonds and practice, in respect to vessels, must be "*special practice*," and violating its own Constitution by saying, "No, its general to that class."

To this we say, if that be true, then it is *class* legislation against *vessels* engaged in commerce. Owners of vessels object to special laws governing the practice, and the bonds given, when their property is attached, as differing from other personal property. The Illinois Courts have always been determined to sustain this "Attachment of Water Craft" Act, regardless of some of its absurd provisions. The whole Act is legislation against vessels and their bondsmen, and its practice in the State Court amounts to a burden on commerce. It was but a light burden in 1845, when enacted, and Chicago's Lake commerce was represented by the clearance of six vessels, with a tonnage of 1552 tons in 1847, but in 1886 it is a burden, when that tonnage is represented by millions—when, crowning the new Chicago Chamber of Commerce swings, as if at anchor, the finest weather-vane in the world, over the largest Board of Trade, a full-rigged, gold-gilded schooner, every sail set, emblem of the mighty commerce in the products of the Northwest, freighted by vessels on the blue waters of the Great Lakes. When vessels, propellers and steamboats can be arrested by any of the numerous Justices of the Peace and Courts of Record in

Cook County, and harsh, harassing and peremptory methods adopted to force settlements, obtain preferences and cut off original maritime liens, it is a regulation of commerce.

Parties dealing in and with vessels object to being compelled to examine all the State dockets, as well as the United States Registry, to learn whether or not the vessels have been proceeded against in a State Court. Titles to vessels are rendered uncertain and difficult to settle. The public weal will be conserved when one tribunal alone, in the well-known way, can pass the title clear of sailing craft. When this Court shall reannounce:

"State Legislatures have no authority to *create* a mari-
"time lien, nor can they confer any jurisdiction upon a State
"Court to *enforce* such a lien by a suit or proceeding *in rem*
"as practiced by Admiralty Courts."

The Belfast, 7 Wall., 624.

The Act has been passed upon by the Supreme Court of Illinois, and sustained in these cases and others:

German vs. *Steamtug Indiana*, 11 Ill., 535.
Williamson vs. *Hogan*, 46 Ill., 504.
Tug Montauk, 47 Ill., 335.
Schooner Norway vs. *Jensen*, 52 Ill., 373.
Tugboat Dorr vs. *Waldron*, 62 Ill., 221.
Propeller Hilton vs. *Miller*, 62 Ill., 231.
Bark Great West vs. *Obendorf*, 57 Ill., 168.
Canalboat Col. Mulligan vs. *Buch*, 55 Ill., 425.
Langdon vs. *Wilcox*, 107 Ill., 606.
Johnson vs. *C. & P. Elevator Co.*, 105 Ill., 462.

The struggle for law is the duty of the citizen; who flinches and allows a denial of right, in the name of law, fails in the discharge of that duty; the law is dishonored. The

plaintiffs in error and their counsel believing them wronged, have exercised the one privilege granted them since (notwithstanding all the right of amendment granted by law) this cause was begun—that of appealing—and have brought this action to the Court of last resort—that justice may be done —the law honored—that a *hearing* may be had—that it may be found that vesselmen have some rights even in Illinois.

It has necessitated a wider scope of effort than was expected—larger questions have arisen. We hope it will result in denying to the State of Illinois the power to proceed *in rem* against ships in domestic commerce on the Lakes, and pass valid titles against the world by Sheriff's deed.

If it shall result in determining that all damages done by a ship by collision are the subject of Admiralty *and maritime* jurisdiction, and within rule XV, "In all suits for damage by collision"—the modern Admiralty law on that subject of the greatest naval power will have been incorporated into the Admiralty practice of the United States, and the narrow rule of "locality" determining jurisdiction in torts will have yielded to the broader one of "subject matter," and another illustration of the principle announced in the *Gennesee Chief* case, and referred to in *Hine* vs. *Trevor*, 4 Wall., viz., that the *reason* of the rule must govern—that in reason a ship itself should be liable for "all damages by the ship," in Admiralty.

It is hoped that this Court may determine that the denial to a part owner of a vessel of the right to defend his property when directly proceeded against *in rem* cannot be sustained.

That it may settle that sureties on bonds given to release vessels are entitled to the same rights as sureties on bonds given to release other property.

That under the "Attachment of Water Craft" Act of

Illinois, it may determine that State Admiralty practice and procedure is unconstitutional, and that this Court will reverse the judgment herein, with directions to the Supreme Court of Illinois to cause the case to be dismissed for want of jurisdiction.

Respectfully submitted,

H. W. MAGEE.

119-388

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

JACOB JOHNSON AND JAMES B. CARTER, OWNERS OF THE TUG BOAT "PARKER," AND HENRY A. CHRISTY,
Plaintiffs in Error,
vs.
THE CHICAGO AND PACIFIC ELEVATOR CO.,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF FOR THE DEFENDANT IN ERROR.

ROBERT RAE,
FOR DEFENDANT IN ERROR.

BARNARD & GUSTAVUS, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

JACOB JOHNSON AND JAMES B. CARTER, OWNERS OF THE TUG BOAT "PARKER," AND HENRY A. CHRISTY,
Plaintiffs in Error,
vs.
THE CHICAGO AND PACIFIC ELEVATOR CO.,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF FOR THE DEFENDANT IN ERROR.

This was a suit commenced by petition in the Circuit court of Cook County under Chapter XII of the Revised Statutes of the State of Illinois, entitled "Attachment of Watercraft," by the Chicago and Pacific Elevator Company against Jacob Johnson, for damages arising from the tug-boat "Parker," of which Johnson was alleged to be the owner, through the negligence of the agents of Johnson, then in charge of the tug-boat, towing the schooner "G. C. Trumpf," on the Chicago river, whereby the schooner ran into the elevator of the petitioner, breaking the same and causing a quantity of corn to run out into the

river. A writ of attachment accordingly issued, in obedience to which the sheriff attached the tug-boat and summoned Johnson to appear. The boat was attached the same day the writ was issued, and was on the same day bonded, under section 15 of the statute, by Johnson, Henry A. Christy becoming his surety on the bond. Johnson, the owner sued, and who is the defendant, among other things, moved in the Circuit court to dismiss the petition for want of jurisdiction, which motion the court overruled. The plaintiff's damages were then assessed by a jury at $300. A motion for a new trial was overruled, and the court entered up judgment jointly against Johnson and Christy, who had given the bond. Johnson and Christy appealed, and the judgment was affirmed by the Appellate court for the first judicial district, in the state of Illinois, and an appeal taken to the Supreme court, which affirmed the judgment of the Appellate court. To the Supreme court, a writ of error is sued out returnable to this court.

The only question which it is the duty of this court to consider, presented in the record, is, whether a suit *in personam* with a clause of attachment against a water craft in aid of such is invalid under the state statute, attempting to give a state court the right to proceed and hear such a cause and to give a judgment *in personam* against the owners of a vessel above twenty tons burden, duly enrolled and licensed by the United States, and employed on the waters of the great lakes, coupled with an order of sale of such vessel to satisfy the judgment and debt of the owner.

It is contended by the plaintiff in error that the attachment of a water craft given by this statute is invalid, as it gives to a state court the right to enforce a lien *in rem*

against a vessel above twenty tons burden engaged in *domestic* commerce, duly enrolled and licensed under the laws of the United States.

The first section of the act of the State of Illinois for the attachment of water craft provides that:

"Every sailvessel, steamboat, steam dredge, tug boat, scow, canal boat, barge, lighter, and other water craft of above five tons burthen, used or intended to be used in navigating the waters or canals of this state, or used in trade and commerce between ports and places within this state, shall be subject to a lien thereon, which lien shall exextend to the tackle, apparel and furniture of such craft as follows:

* * * * *

Fifth. For all damages arising from injuries done to persons or property by such water craft, whether the same are aboard said vessel or not, where the same shall have occured through the negligence or misconduct of the owner, agent, master or employe thereon; but said craft shall not be liable for any injury or damage received by one of the crew from another member of the crew."

Sec. 4. *Petition.* 4. The person claiming to have a lien under the provisions of this act may file with the clerk of any court of record of competent jurisdiction, in the county where any such water craft may be found, a petition setting forth the nature of his claim, the amount due after allowing all payments and just offsets, the name of the water craft, and the name and residence of each owner known to the petitioner; and when any owner or his place of residence is not known to the petitioner, he shall so state, and that he has made inquiry and is unable to ascertain the same; which petition shall be verified by affidavit of the petitioner or his agent or attorney. If the claim is upon an account or instrument in writing, a copy of the same shall be attached to the petition. (R. S. 1845, p. 72, Sec. 2; L. 1857, p. 105, Sec. 3.)

Sec. 6. *Writ. Names of Defendants.* 6. Upon the filing of such petition and bond as aforesaid, the clerk shall issue a writ of attachment *against the owners* of

such water craft, directed to the Sheriff of this county, commanding him to attach such water craft, which writ shall be tested and returnable as other writs of attachments. Such owners may be designated by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known. If the name of any owner is unknown, he may be designated as unknown owner. (L. 1857, p. 105, Sec. 4.)

SEC. 15. *Bonding vessel.* 15. The owner, or his agent or attorney, or any other person interested in such water craft, desiring the return of the property attached, having first given notice to the petitioner, his agent or attorney, of his intention to bond the same, may, at any time before judgment, file with the clerk of the court in which the suit is pending, a bond to the parties, having previously filed petitions against such craft, in a penalty at least double the aggregate of all sums alleged to be due the several petitioners, with security to be approved by the clerk, conditioned that the obligors will pay all moneys adjudged to be due such claimants, with costs of suit. (R. S. 1845, p. 72, Sec. 5; L. 1857, p. 105, Sec. 5.)

SEC. 20. *Amendments—New Parties.* 20. Amendments may be allowed as in other cases and upon like terms and conditions, and the court may take all proceedings and make all orders necessary to fully dispose of the rights of all persons interested in the property attached, and for that purpose may add new parties whenever necessary, who may be sumoned or notified as in case of original defendants."

The petition sets up that the tug "Parker," whereof Jacob Johnson is the owner, was so carelessly managed by her officers and crew as to cause a certain schooner then in tow of said tug to come in contact with petitioner's warehouse, situate in the City of Chicago on land adjacent to the Chicago River, by reason whereof the schooner's jib-boom penetrated and went through the walls of said warehouse and caused a large quantity of grain therein

stored, to-wit : six hundred bushels, to spill out and run into the river and thereby become lost to the petitioner.

The petition further alleges that on the 29th of August, 1881, the date of said trespass, the said tug-boat was a water craft and tug-boat of over five tons burden, used and intended to be used in navigating the waters of the State of Illinois and her canals, and having its home port in this state. (Rec., folios 3, 4.)

Upon the filing of said petition, a summons issued to said Johnson to answer what may be objected against him with a clause of attachment against said tug. (Rec., folio 10.)

On the same day a bond was given by Johnson to pay all moneys adjudged by the court to be due the plaintiff. (Rec., folios 12, 13.)

On the 17th day of October, 1881, a demurrer was filed to said petition. (Rec., folio 16.)

On October 21, 1881, a default was entered on said petition by said Johnson. (Rec., folios 17, 18.)

That afterwards Johnson appeared, filed an answer and moved to set aside the default. This motion was denied. (Rec., folios 18, 19.)

This answer filed with a motion to set aside the default, admitted that the tug was, at the time when, etc., engaged in navigating the waters of the State of Illinois.

Afterward said Johnson moved the court to dismiss the petition for want of jurisdiction in said court, to enforce the lien claimed and prayed for in said petition, and showed in support of the motion "that the tug is a vessel "of over twenty tons burden, duly enrolled and licensed "in conformity with Title 'L' of 'Regulations of ves- "sels engaged in domestic commerce' of the revised "statutes of the United States, and then was and now is

"engaged in the business of domestic commerce and nav-
"igation upon the navigable waters of the State of Illi-
"nois."

No evidence was offered to sustain the facts set up in the motion, and the motion was denied. (Rec., fol. 36.)

The court then proceeded to empanel a jury to assess the damages and the verdict was rendered from which judgment was had for the petitioner.

I.

The default entered against the defendant Johnson, admits all the material facts well pleaded in said petition, and these material facts, so far as the business in hand is concerned, which are admitted, are: (1). That the injury complained of and which is the gist of the action occurred on land. (2) and that the officers of the tug who brought the disaster about were the servants of the defendant Johnson, and (3) the tug was a vessel above five tons burden, used and intended to be used, in navigating the waters of the state of Illinois, where she was owned.

II.

Both by the act of 1845 and the decisions of this court and by the present twelfth rule in admiralty, the power of the several states to create by statute liens upon domestic vessels, without reference to the business they are engaged in, is recognized, irrespective of whether such states have situate within their boundaries navigable waters governed by the act of 1789 or the act of 1845. If the

contract of which they are the incident is of a maratime nature, the Admiralty courts of this country adopt and enforce them. If, on the other hand, the contract is not of a maratime nature, it is left to the state court to deal with it and enforce it.

People's Ferry Co., 20th How., 393.
Roach v. *Chapman*, 22d How., 129.

III.

The tort complained of was committed by the officers of a vessel domestic to the state of Illinois, and employed on her waters and canals, and to a warehouse on land, and neither the tort nor the vessel attached in the suit is within the admiralty and maritime jurisdiction.

The Plymouth, 3rd Wal., 20.
The Prop. Commerce, 1st Black, 574.
The Steamboat Orleans, 11th Peters, 175.
The Mary Stuart, 5th Hughes, 312.
The Kingston, 23d Fr. Rep., 200.

IV.

The ninth section of Judiciary Act of 1789 confers exclusive original cognizance of all civil causes of admiralty jurisdiction upon the District court of the United States. The cause in question at bar is not a civil cause of admiralty and maritime jurisdiction, and therefore is one neither cognizable in the admiralty nor exclusive in the federal courts. The state and her courts may deal with it, hence it was well said by Mr. Justice CLIFFORD, in the case of

the *S. B. Co.* v. *Chase*, 16th Wall., 530: "Where no "remedy exists for an injury in the admiralty courts, the "fact that such courts exist and exercise jurisdiction in "other causes of action leaves the state courts as free to "exercise jurisdiction in respect to an injury not cogniz- "able in the admiralty, as if the admiralty courts were "unknown to the constitution and had no existence in our "jurisprudence." (Foot of page 530.)

V.

While the act of 1789 prohibits the state courts in cases of admiralty and maritime jurisdiction to enforce proceedings *in rem*, the act does not prohibit such courts from using such process when authorized by statute, in cases which are not of admiralty and maritime jurisdiction.

Indeed, proceedings *in rem* are of much greater antiquity than the admiralty itself, or the instruments with which it deals, and existed before Noah's ark was built. (Exodus xxi., 28.) It was in use by the Greeks before Æschylus wrote. *Aeschines* v. *Ctesiphon*, 244–245. The Noxal action antedates the law of the Twelve Tables in Rome. In England we have the law of Deodands, but, curiously enough, ships were exempt from this law, and as to them a proceeding *in rem* is denied. *The Sea Laws*, *Discourse I.* At a very early date in England the Lord Chancellor and the barons of the Exchequer proceeded *in rem* against goods and lands in cases of violation of the revenue. Bracton, 122, Fillmore's Int. Law, I., p. XIV.

Proceedings *in rem* may be given by state statutes to

enforce municipal laws, internal revenue laws, laws against the publication of obscene literature, liens for rent, mechanics' liens, and the like; inn-keepers and others, who at common law have the mere right to retain the possession, but could not sell without judgment against the general owner and upon execution issued upon such judgment. These proceedings *in rem*, under such statutes, are sustained by the courts, and are in constant use in common law matters, and are not forbidden to the states because the admiralty and the civil law have used them as part of their ways and means of enforcing maritime liens. *Barnacoat et al.* v. *Gunpowder*, 1st Met., 230. *State* v. *Barrels of Liquor*, 47 N. H., 374.

The civil law never confine itself to proceedings *in rem* in maritime cases, nor to the law merchant. The hypothica of the civil system had reference to every species of movable and immovable property. The judicature of all countries has ever used the proceeding *in rem* to things hostile as part of the law of war.

In view that all countries have ever used the proceeding *in rem* irrespective of the fact whether the litigation arose on sea or land, it is but reasonable in construing the act of 1789, to confine the doctrine, that the states can not create proceedings *in rem*, to proceedings in admiralty; and not to extend the prohibition to litigation and things not exclusively within the judicial control of the federal courts, such as admiralty jurisdiction undoubtedly is under this act, when proceeding *in rem*, and leave the power to the several states in all other cases, to introduce such a proceeding into their jurisprudence whenever the needs of their people may demand it.

The first section of the third article of the constitution of the United States provides: That the judicial power

of the United States shall be vested in such inferior courts as the Congress may from time to time ordain and establish, and the first clause in the second section of the same article extends the judicial power to all cases of admiralty and maritime jurisdiction. This jurisdiction is not unavoidably exclusive of all state authority, but may be made so at the election of Congress, and, therefore, by virtue of this power Congress elected in the 9th section of the judiciary act of 1789, that the District courts of the United States should have, exclusively of the courts of the several states, cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

This act passed at so early a date, was for many years thereafter sufficient for all the wants of commerce and trade. Upon the introduction and growth of steam navigation upon the internal waters of the United States, Congress supposed the wants of commerce demanded further congressional legislation, and the act of 1845 was passed. Its framers erroneously supposed at the time of its passage, that this act was necessary to extend the jurisdiction of the admiralty over the great lakes and the navigable waters connecting them, and without such legislation it did not exist. In this Congress was mistaken, and it was subsequently found by this court, that by giving the provisions of the act a literal interpretation, this jurisdiction instead of being plenarily extended over the great lakes and their tributaries, as exercised under the act of 1789, would exist only to a limited extent; therefore, all limitations which narrowed the scope of admiralty and maritime jurisdiction exercised under the act of 1789 and which were inconsistent with the in-

tention of Congress to give upon the lakes and the navigable waters connecting them, the same jurisdiction in matters of tort and contract, as was then exercised by the United States district courts in cases of like steamboats and other vessels engaged in navigation and commerce upon the high seas or tide-waters within the admiralty and maritime jurisdiction of the United States, were held to be by this court inoperative and obsolete. To keep them in force would be in violation of the intention of Congress.

But other provisions were added to the act of 1845, in the interest of the public doing business on the lakes and connecting waters and for the promotion of the common weal. And Congress so intended them to be additional to the provisions of the act of 1789, and these conditions are not inconsistent, either with the act of 1789, or the expressed will of the federal legislature. The trial by jury was added, and although some of the inferior courts of admiralty have so interpreted the effect of this clause as to make the verdicts of such juries merely advisory and not obligatory upon the judicial conscience, this provision is still in force and part of the American law of the seas. Another provision of the act of 1845, not found in the act of 1789, saved to the suitor any concurrent remedy given by State law.

It was in the power of Congress to make the jurisdiction in admiralty exclusive or concurrent, and in dealing with inland navigation so far as it concerned the great lakes and navigable waters connecting the same, it concluded to make and did make such remedies as the States might give, concurrent.

This intention was present, fully felt and appreciated in, and by the mind of the great judge, who was at the time

one of the associate justices of this court, who drew the act. In the case of the General Smith (4 Wh., 438), Judge STORY, in delivering the opinion of this court, fully realized and so decided in that case, that local laws might play an important part in giving or withholding the right of suitors to proceed *in rem* in cases of domestic vessels, and where without the aid of such laws they could not have the benefit of such a remedy, and with this learning fresh in his mind, he felt the gravity of the omission in the act of 1789, which while saving to suitors such remedies as the common law was competent to give them, neglected to give to the suitor in a proper case, the benefit of any local law which the several states might supply; hence we find the addenda.

Mr. Justice MILLER, in the case of *The Hine* v. *Trevor*, in speaking of the act of 1845, says: "The jurisdiction "is not exclusive, but is expressly made concurrent with "such remedies as may be given by state laws." (4th Wallace, 566.)

It would be a startling proposition for the profession or the legal mind to willingly accept as good law that that which is expressly made by Congress within its power to make, should be within the power of judicial construction to declare void and obsolete. No case arising under the act of 1845 has gone so far, and there is no reason so cogent, or benefit to the public to be secured so great, that this court will feel itself called on, even to promote the common welfare, to treat an act of Congress unquestionably constitutional and of a highly remedial character, as void or obsolete. If the Congress of the United States has the right in providing for the exercise of the judicial admiralty powers, to which the constitution declares the authority of the Federal judi-

ciary shall extend, to make that provision concurrent, then undoubtedly Congress has done so by this act, and this court will not willingly undo it. The concluding remarks found in the opinion in the case of *The Hine* v. *Trevor*, are significant. After denying the right of the states to make the jurisdiction of their courts concurrent in all cases of admiralty and maritime jurisdiction by simply providing a statutory remedy, the court say: "In the act of 1845, where Congress does mean this "(make the jurisdiction concurrent), the language ex- "presses it clearly; for after saving to the parties, in "cases arising under that act, a right of trial by jury, "and the right to a concurrent remedy at common law, "where it is competent to give it, there is added, 'any "concurrent remedy which may be given by the state "laws where such steamer or other vessel is employed.'" Page 572.

The doctrine here announced has been subsequently adhered to and quoted by Mr. Justice CLIFFORD in the case of The Belfast, 7th Wal., 64.

It is said, however, the case of The Eagle, 8th Wal., 15, has explained and weakened the force of what was then said in the case of *The Hine* v. *Trevor*. This is true as to what was said by the court in the latter case in reference to the act of 1845 being a grant of jurisdiction, and the court further says in the case of The Eagle, that nothing was said in the case of *The Hine* v. *Trevor*, which would infer that the act of 1845 was a limitation or restriction of the jurisdiction conferred under the act of 1789; but the court goes no further, it does not say that when Mr. Justice Miller, in delivering the opinion in the case of *The Hine* v. *Trevor* declares the act of 1845 as in force on the lakes, and that by the terms of this act the

jurisdiction is made concurrent with, and not exclusive of such remedies as may be given by state laws, the words were unadvisedly spoken by him, and at a time when he had not carefully considered and weighed the language used by him in that opinion.

It is true that the court do say in the case of The Eagle, that what was said by the learned justice in delivering the opinion of the court in the case of *The Hine* v. *Trevor* was made in answer to and to correct a misapprehension and an impression among the profession in that section of the country bordering on the Mississippi river, that the western rivers were in the admiralty jurisdiction exercised over them, governed by the act of 1845 and not by the act of 1789. To correct this impression and misapprehension the learned justice in delivering the opinion of the court, corrected it by a reference to and construction of the act of 1845, which construction the court in the case of The Eagle found was itself erroneous, so far as the act was interpreted as a grant of jurisdiction, so that a misapprehension of the learned profession in that section of the country was corrected, by a misapprehension of this court. But the mistake trangressed no further. What was said about the act of 1845 in the case of *The Hine* v. *Trevor* occupies more than two-thirds of the decision, and therefore in its general scope, although *obiter*, must be regarded in so able and concise a writer and lawyer with the concurrence of every member of the court as being deliberate and well considered. It was only what was said incidentally as to jurisdiction that may be treated as a mere slip of the pen. As to what was said about the act of Congress and the clear, distinct terms in which its provisions are expressed, is the deliberate conclusion of this court and must be so treated.

There is no expression of this court, in its opinion in

the case of The Eagle, that the language used by Mr. Justice Miller, when he declared the act of 1845 is in force on the lakes, and that by the terms of the act the jurisdiction is made concurrent with and not exclusive of such remedies as may be given by state laws, such a declaration was erroneous, and as such corrected in the opinion in the case of The Eagle.

As we have seen, by virtue of the Constitution, Congress has the power to order what inferior courts shall exercise the admiralty power, and to make the exercise of such powers exclusive or concurrent, and effect is to be given to the saving of the suitors of a common law remedy, where the common law is competent to give it, and by force of the same reasoning effect is to be given to the added clause, saving to the suitors any concurrent remedy which is given by the state law. It will be difficult to find any good reason to approve the one and reject the other. The better interpretation is, that as to those provisions of a limiting or repealing nature, affecting the provisions of the Act of 1789, found in the Act of 1845, to so construe them as to have this effect, would be to violate the plain intention of Congress, as manifested on the face of the act, but to those things which are amendatory and not inconsistent with the previsions of the act, they shall have full force and effect.

This would be more in harmony with the subsequent course of decisions of this court, and which forbids any other construction. The Lottawanna, 21st Wal., 578. The Belfast, 7th Wall., 624. The Moses Taylor, 4th Wall., 411. *The Hine* v. *Trevor*, 555. The Edith, 94 U. S., 518. *S. V. Co.* v. *Chase*, 16 Wall., 531. *Leon* v. *Galceran*, 11th Wall., 187.

ROBERT RAE,
For Deft. in Error.

1886

576

Supreme Court United States

119 U.S.

401-477